Supreme Court, U. S.
FILED
SEP 8 1978
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-398

ALFRED KOVACH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GEORGE C. PONTIKES
Foss, SCHUMAN & DRAKE
11 South LaSalle Street
Chicago, Illinois 60603

THOMAS BULLARD
3609 Main Street
East Chicago, Indiana 46312

Attorneys for Petitioner

Midwest Law Printing Co., Chicago 60601, FInancial 6-3988

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Petitioner, Alfred Kovach, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Seventh Circuit entered on June 14, 1978, in the above entitled cause.

CITATION TO THE OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, printed in Appendix attached hereto, *infra*, pages 1a-14a is unreported at present.

JURISDICTION

The opinion and judgment of the Court of Appeals were filed and entered on June 14, 1978. A timely Petition for Rehearing was filed and denied on July 31, 1978. This Petition for Writ of Certiorari will be timely filed.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

I. Whether petitioner can be held liable for a major conspiracy, to which he did not agree, when the prosecution for the subsidiary minor conspiracy, to which he did agree, is barred by the statute of limitations?

II. Whether a severance is required, when evidence at trial shows a tenuous connection to the conspiracy charged and the defendant is severely prejudiced by the introduction of large amounts of evidence with which he has little or no connection?

STATUTES INVOLVED

Title 18 of the United States Code, Section 371 provides as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Title 18 of the United States Code, Section 3282 provides as follows:

> "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

STATEMENT OF THE CASE

The indictment in this cause was returned on September 30, 1976, in ten counts, and named seven defendants, including the petitioner. The indictment is reproduced in the Appendix (18a-54a).[1] Count I charged all seven defendants with conspiracy to commit offenses against the United States in violation of 18 U.S.C., § 371. The offenses alleged to be the objects of the conspiracy were (a) the use of the mails in furtherance of a scheme to defraud the East Chicago Board of Sanitary Commissioners and the citizens of East Chicago and to obtain money and property by means of false and fraudulent representations, in violation of 18 U.S.C., § 1341; and (b) traveling in interstate and foreign commerce and use of the facilities thereof to promote, manage, establish and carry on bribery contrary to Indiana law, in violation of 18 U.S.C., § 1952. Count IX charged petitioner with false declarations under oath before the grand jury, in violation of 18 U.S.C., § 1623.

The jury found the defendants Fitzgerald, Hamilton, Schubert, Leahu and petitioner guilty on all the counts submitted to them for consideration. On May 13, 1976. the trial court imposed a sentence of five years each on Counts I and IX to run concurrently with a $10,000 fine on Count I; sentence subject to 18 U.S.C. § 4205(b)(2).

An appeal was taken to the Court of Appeals for the Seventh Circuit. The conviction was affirmed by an opinion and judgment order, dated June 14, 1978, (1a-15a). A timely Petition for a Rehearing was filed and denied on July 31, 1978, (16a).

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[1] References are to pages in the Appendix to this Petition.

The trial in this cause took eight weeks and the transcript below has a total of 7,373 pages. The evidence introduced in the total trial is summarized in the allegations of Count I of the Indictment (18a-40a). It is suggested that the allegations of Count I be read at this point, before the rest of this Petition is reviewed. Such a reading will convey a grasp of the whole case, as it was presented. The evidence with regard to petitioner was a miniscule part of the total testimony.

The Government's evidence tended to establish 10 separate and distinct conspiracies:

1. There was an agreement by Hernly, Wetterlin, Hamilton, Schubert and Fitzgerald to divide the profits from the Big Job and to send money to a corporation in Switzerland for tax avoidance or evasion.

2. There was an agreement between Hernly, Wetterlin, Hamilton, Fitzgerald, Schubert, Leahu and petitioner that a million dollars would be paid to certain East Chicago officials.

3. There was an agreement between Hernly, Wleklinski and Callahan for payment of money to Callahan and Wleklinski for services that they would not and did not render.

4. There was an agreement between Hernly, Leahu and Elmer Layden to provide a phony performance bond.

5. a. There was an agreement to pay certain expenses of Schubert for home improvements.

b. There was an agreement to pay certain expenses of Hamilton for home improvements.

6. There was an agreement to give Cookie Leahu a horse.

7. There was an agreement to put Hinesley on the payroll for services that were not performed and to pay his phony invoices.

8. There was an agreement to pay phony invoices of Wetterlin which were to be used to pay Hinesley for services not performed.

> 9. There was an agreement to enter into a partnership called Columbine One so that profits from the Big Job could be invested and/or distributed to Hernly, Fitzgerald, Hamilton and Schubert.
>
> 10. There was an agreement to impede the collection of taxes by all the defendants, except petitioner who is not alleged to have received any income. (18a-54a)

The Government and the court below did not disagree that these 10 conspiracies were demonstrated by the evidence. Rather, they stated that all of the conspiracies were part of the larger complex conspiracy charged in Count I. (18a-40a) (Government's Brief below pp. 35, 37)

There was no evidence to show that the petitioner agreed to join any of the above conspiracies, except the conspiracy to bribe. There was no evidence to show that the petitioner agreed to join the larger complex conspiracy described in Count I.

The evidence as against petitioner was related in substance to three meetings and conversations alleged in Count I of the indictment. The first meeting relates to the allegation in paragraph 48 (5) of the indictment (32a). On September 20 and 21, 1969, Hernly attended a meeting at the Palmer House in Chicago. Also in attendance were Hamilton, Schubert, Wetterlin, Fitzgerald, Ted Leahu, petitioner and two representatives of a company which manufactured concrete sewer pipe. After the pipe company representatives were excused from the meeting, Hernly testified that the following took place:

> Mr. Leahu said that the meeting was called to see how $1 million that was needed for the East Chicago officials would be handled, that he believed that the price of the pipe could be inflated, handled through the pipe company.

> Charlie Fitzgerald spoke up and said he did not see how pipe that cost $700,000 no matter what company you buy it from, how it could be inflated to $1,700,000 and questions not be asked.
>
> Mr. Leahu and Mr. Kovach had a little private conversation between themselves and Kovach said this plan would not work, we had to come up with some other type of a plan.
>
> * * *
>
> Mr. Hamilton said he believed that we had a foolproof method by which money could go to Switzerland and be returned in cash without—and be used, this money would be expense to the company sending it, and it would be non-taxable to the people receiving it. Al Kovach and Leahu had another conversation, and Al Kovach said he believed this would be the method to be used. (55a, 56a).

Hernly contradicted himself thereafter during cross-examination (TR 2948-2949, TR 3011-3017)[2] and ultimately testified that Leahu approved the method for sending the money to Switzerland. (TR 3016).

The second meeting is the one described in Paragraph 48(8) of Count I of the indictment (33a). The evidence to that meeting is as follows:

> Leahu related to Kovach the problem I had with the bond. Then Leahu had a quiet conversation with Kovach. Leahu asked if I cared if he helped to see if he could get a bond, or if he could help get a bond, and I said no, I would be glad for him to.
>
> So Leahu and Kovach talked again, then Kovach slapped Leahu on the shoulder and said, "See what you can do, see what you can work out." (57a)

The third meeting is described in paragraph 48 (23). (35a) The evidence as to that is as follows:

> Q. Who was present at that time?
>
> A. Robert Hamilton, Schubert, Fitzgerald, and myself, and Mr. Kovach . . .

[2] "TR" refers to transcript of the evidence.

Q. Excuse me, just explain what you said to Mr. Kovach.

A. I said to Mr. Kovach that we cannot return any more money to the United States until more money goes to ITAG. On the first trip, there had been $70,000.00 returned out of $150,000.00, which was 70 percent.

The second trip, there were $75,000.00 returned out of the $90,000.00, which is more than 70 percent, and the ITAG officials objected to letting that amount come back. So, there was no way we could get more money from ITAG officials until more money went over, according to the Letter of Intent and the mandate.

Q. Excuse me, Mr. Hernly, how much money came back the first time?

A. $105,000.00.

Q. After you explained this to Mr. Kovach, what other conversation did you have?

A. Mr. Kovach—I said to Mr. Kovach that the other money has been used on mobilization, buying equipment, and put into the job. Mr. Kovach said—Mr. Robert Hamilton said that Leahu was at the airport, leaving for a trip to England. Schubert asked Kovach to get him back before he left, to get the papers through. (59a)

There was no other testimony regarding petitioner in the trial and no other testimony connecting him with any of the other conspiracies outlined above.

A reading of Count IX with regard to the perjury is self-explanatory (50a-52a).

In the Court of Appeals, petitioner argued among other things, that there was no evidence that he joined or agreed to the larger conspiracy alleged by the government in Count I, but rather joined the subsidiary conspiracy to bribe, the prosecution for which was barred by the statute of limitations. In addition,

petitioner argued that his repeated motions for severance had to be granted, where the evidence showed that he had a tenuous connection with the large single conspiracy and that he was severely prejudiced by the introduction of evidence with which he had little or no connection, citing the case of *United States v. Kelly*, 349 F.2d 720 (C.A. 2, 1965).

While the court discussed the issue of the statute of limitations in connection with the question of whether or not a single conspiracy was proven, it did not discuss the question of whether there was evidence to show that petitioner joined the conspiracy at issue or whether his motions for severance should have been granted because of his tenuous connection with single conspiracy or the evidence introduced against him. The court disposed of those issues with the following:

> "We studied all of the other claims of error. None of them have merit, and most of them are frivolous." (14a)

REASONS FOR GRANTING THE WRIT

I.

The Court is being asked to determine a question of importance in Federal criminal law concerning the law of conspiracy, namely, whether petitioner can be held liable for a major conspiracy, to which he did not agree, when the prosecution for the subsidiary minor conspiracy to which he did agree, is barred by the statute of limitations?

The Court has not in recent years ruled on the question of what is sufficient to show agreement to a large, complex conspiracy, where the evidence shows that the conspiracy in question is composed of a large number of subsidiary conspiracies and that evidence shows that he joined a subsidiary conspiracy but not the larger one. This question is of great importance, where, as here, the evidence shows that the prosecution for the conspiracy which the evidence demonstrates, petitioner did join is barred by the statute of limitations. As this court stated in *Grunewald v. United States*, 353 U.S. 391, at 396-397, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957):

> ". . . where substantiation of a conspiracy charge requires proof of an overt act, it must be shown both that the conspiracy still subsisted within the three years (presently five years) prior to the return of the indictment, and that at least one overt act in furtherance of the conspiratorial agreement was performed within that period. Hence, in both of these aspects, the crucial question in determining whether the statute of limitations has run is the scope of the conspiratorial agreement, for it is that which determines both the duration of the conspiracy, and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy."

The Second Circuit Court of Appeals in *United States v. Borelli*, 336 F.2d 376 (C.A. 2, 1964), following *Grunewald*, determined that the evidence in that case did not show that the defendant agreed to the conspiracy that the government alleged and proved.

The evidence in this case also does not show petitioner's agreement and joinder of the large, complex conspiracy that the government sought to prove below. The finding that he did agree to join it violates the rule of *Grunewald* and *Borelli*. Furthermore, such a finding in this cause approaches the point of violating his due process rights because it holds him liable for agreements and acts connected to him, in order to avoid the statute of limitations. Due process forbids that a man be criminally liable for a conspiracy that he did not agree to join. Such a determination would attach criminal responsibility without fault, which this court has refused to do with the narrow exception of the cases involving strict liability.

Although this issue was briefed and argued at length in the Court of Appeals below, the court refused to discuss the question, claiming that it did not have merit and was frivolous (14a). Even though the opinion did not discuss this case, the facts of the opinion are set forth with sufficient detail, so as to make this decision one that can be cited as being opposed to the position herein.

An examination of the evidence below demonstrates that petitioner did not agree to the large complex conspiracy, but rather only to the conspiracy to bribe.

As stated above, *supra* (pp. 5, 6), the evidence established 10 conspiracies. The government and Court below did not disagree that the evidence established 10 conspiracies, but the government contended and the

court agreed that the evidence showed a larger conspiracy. (Government brief below pp. 35, 37).

The only evidence as to the nature of petitioner's agreement concerns the so-called Palmer House meeting, where the following transpired.

1. Leahu said that the meeting was called to see how $1,000,000.00 needed for East Chicago officials was to be handled.

2. The suggestion of inflating the cost of the pipe was vetoed by petitioner as being impractical.

3. Hamilton described this method of sending money as expenses to Switzerland and have it returned in cash, as follows:

> "Mr. Hamilton said he believed that we had a foolproof method by which money could go to Switzerland and be returned in cash without—and be used, this money would be expense to the company sending it, and it would be non-taxable to the people receiving it."

4. Leahu *or* petitioner approved this method of paying the bribes.

5. Leahu approved of using Hamilton's method of generating an additional $1,000,000.00 to cover the possibility of the disallowance of the expenses and subsequent liability for taxes.

According to the Government, the conversation at the Palmer House meeting demonstrates the following:

> "While this conversation shows an agreement to bribe, it also shows, *standing alone*, a broader agreement that contemplated compromising the competitive bidding system to insure that a contractor agreeable to the fraud would be awarded the contract; submission of false documents to the sanitary district to generate additional and payoff funds; developing a system by which project funds could be fraudulently paid to a Swiss company; transporting bribe money back to the United States from Switzerland; and creating a reserve fund in Switzerland to be utilized if the Swiss payments

> were discovered not to be business related. In substance, Kovach and Leahu agreed to a system by which sewer project fiduciaries would manipulate the sewer project administration in order to create a fund from which bribes would be paid and from which appellants could benefit personally. While all the details of the fraud were not clearly established at the Palmer House meeting, the method or structure for carrying out the fraud was agreed upon by all appellants." Government's Brief Below, pp. 31-32 (Emphasis added)

Petitioner submits that this conversation in no way demonstrates such a "broader agreement." The Government's position is that this conversation, all by itself, shows petitioner's agreement to all of the conspiracies described above. An impartial reading of that evidence cannot support such a contention.

The Government's evidence as to that meeting does not demonstrate an agreement by petitioner that would lead to his desire for the reaching of the objects of the other conspiracies, i.e., that petitioner desired that Hernly, Wetterlin, Hamilton, Schubert and Fitzgerald would divide profits; that Wleklinski and Callahan would receive legal fees; that Elmer Layden would receive money for a false performance bond; that certain home improvements of Schubert and Hamilton would be paid for; that Cookie Leahu would receive a horse; that Hinesley would be put on the payroll of Hernly Brothers, Inc.; that Wetterlin would be paid for phony invoices on behalf of Hinesley; that certain investments would be made in Columbine One; or that people other than petitioner would avoid paying taxes.

All of the defendants except petitioner were charged in Count VIII with conspiracy to prevent the Treasury Department from collecting taxes. The logical inference from this omission is that petitioner did not receive in-

come from any of the other conspiracies and that petitioner did not have the slightest interest in any of the various other conspiracies, or to hide, distribute, transfer, or conceal from the Treasury Department monies received by the various alleged conspirators for their own use.

The essential question, which the court of appeals below ignored, is whether petitioner agreed to join any conspiracy except the second conspiracy, the conspiracy to bribe. Petitioner is not responsible for any act to which he did not agree:

> "nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it; if later comers change that, he is not liable for the change; his liability is limited to the common purposes while he remains in it." *United States v. Peoni*, 100 F.2d 401, at 403 (C.A. 2, 1938)

The Second Circuit Court of Appeals in deciding what makes a man a conspirator has held that:

> ". . . we have uniformly held that the prosecution must prove the accused to have associated himself with the principles in the sense that he has a stake in the success of the venture." *United States v. Di Re*, 159 F.2d 818, at 819 (C.A. 2, 1947)

There is no allegation that petitioner had any interest in his monies being transferred back and forth between other conspirators and ITAG and BESSI. In that these transfers took place without his knowledge and in that he had no pecuniary interest in them, he had no stake in their outcome.

The "stake in the venture" test was discussed in Developments in the Law,—Criminal Conspiracy, Harvard Law Review, Volume 72, Page 922 at 932, wherein it was stated that:

> "The stake in the venture test remains the clearest way of finding a real desire for the object of a conspiracy and a fortiori the intent of that object necessary for criminal liability",

and at 931 the "stake in the venture" test was described as:

> ". . . being based upon the sound realization that each party to a conspiracy must intend the object, and that intent is the 'something more' which must be joined with knowledge in order that there be an agreement to that object."

The Second Circuit Court of Appeals stated in *United States v. Falcone, et al.*, 109 F.2d 579, (C.A. 2, 1940), that for one to be a conspirator:

> ". . . he must in some sense promote their (other conspirators) venture himself, make it his own, have a stake in its outcome." 109 F.2d, at 581.

The necessity of determining the actual agreement of each alleged conspirator is pointed out in *United States v. Borelli, supra,* at 394, (C.A. 2, 1964), where the court held that:

> ". . . although it is usual and often necessary in conspiracy cases for the agreement to be proved by inference from acts, the gist of the offense remains the agreement, and *it is therefore essential to determine what kind of agreement or understanding existed as to each defendant.*" (Emphasis added).

The guideline for the Court in determining the object of any alleged conspiratorial agreement by petitioner should be his "stake in the outcome." The Court in *Borelli, supra,* at 394, stated the following in language directly applicable to this case:

> "(5) The view that if the evidence warrants the finding that some defendants were parties to a single agreement to sell contraband for a nine year period, it necessarily does so as to every defendant who has

> conspired with them at any time for any time for any purpose, is thus a considerable over simplification. . . .
>
> . . . The Government must present evidence justifying the jury in finding beyond a reasonable doubt that the particular agreement into the period not barred by limitation, *Grunewald v. United States*, 353 U.S. 391, 396, 77 S. Ct. 963, 1 L.Ed. 2d 931 (1957), and the scope of his agreement must be determined individually from what was proved as to him. If in Judge Learned Hand's well-known phrase, in order for a man to be held for joining others in a conspiracy, he "must in some sense promote their venture himself, make it his own", *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir.), aff'd, 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128 (1940), it becomes essential to determine just what he is promoting and making 'his own'." 336 F.2d, at 384-385.

The record below reveals that petitioner, at most, was promoting the payment of $1,000,000.00 to East Chicago officials and nothing else. He had no stake in any other activity.

Although the Court of Appeals below did not discuss all these issues, its decision is in direct conflict with the decision of the Court of Appeals for the Second Circuit in *United States v. Borelli, supra.* Petitioner is in the exact same position as Tantillo was in that case.

> "Rinaldo's testimony thoroughly warranted the finding of an agreement among himself, Joe and Rosario Mogavero beginning in 1950 and continuing through 1959. But it does not follow, for example, that his recital of two deliveries to Tantillo in March and July 1951, on the instructions of Locascio in one instance, and of Rosario Mogavero in the other, would justify a finding that Tantillo had thereby made himself a part of whatever narcotics enterprises Locascio, the Mogaveros and their future partners might engage in for the rest of

> their lives, provided only that these were uninterrupted—a theorem that would lead to the inevitable but extraordinary conclusion that Tantillo's two purchases entered him into a 'partnership in criminal purposes,' *United States v. Kissel*, 218 U.S. 601, 608, 31 S.Ct. 124, 54 L.Ed. 1168 (1910), with Castiglia, who supplied a source to and took deliveries from an altered core seven years later, and *vice versa*." 336 F.2d, at 384

In exactly the same sense, petitioner's agreement as to the source of the funds for the payment of the bribes can in no way give rise to an inference that he was responsible for all the other illegal agreements and activities with which he had no connection or with which he had no interest.

There is no dispute that the conspiracy to bribe ended more than 5 years before September 30, 1976. The Government did not dispute this and the court below agreed:

> "Kovach and Leahu contend that their prosecution is time barred because they were indicted on September 30, 1976, which was more than 5 years after the bribery conspiracy had been completed." (8a).

Since the conspiracy to which petitioner agreed terminated more than 5 years prior to September 30, 1976, the prosecution was barred by the statute of limitations, *Grunewald v. United States*, *supra*.

The effect of the Government's contention and the Court's determination is to hold petitioner responsible for conspiracies and conduct to which he did not agree and in which he did not have an interest, in order to avoid the statute of limitations. A man cannot be held criminally responsible for conspiracies and conduct of the type demonstrated in this case, for the purpose of extending the statute of limitations, if he did not agree or

have an interest in them. To hold otherwise, is to have a direct conflict with this Court's decision in *Grunewald v. United States, supra,* and the decision of the Second Circuit Court of Appeals in *United States v. Borelli, supra,* and such a finding of criminal liability without fault raises serious due process questions.

Accordingly, petitioner respectfully submits that this Court should issue its Writ of Certiorari in order that it may decide this important question of Federal criminal law.

II.

The Court is being asked to determine an important question of Federal criminal law, namely, whether a severance is required, when evidence at trial shows a tenuous connection to the conspiracy charged and the petitioner is severely prejudiced by the introduction of large amounts of evidence with which he has little or no connection?

This Court has not determined this question, which was denied in *United States v. Kelly,* 349 F.2d 720 (C.A. 2, 1965). It is an important question in that it involves the issue of whether due process requires a severance when a defendant has a tenuous connection with a conspiracy and he is severely prejudiced by the introduction of evidence with which he has almost no connection. For a defendant to be tried jointly with other persons under these circumstances deprives him of a fair trial. In the present case the jury was not given an opportunity for a fair and impartial determination of petitioner's defense.

It was part of petitioner's defense that he was not part of any conspiracy pursuant to which any overt act occurred after September 30, 1976, and that, therefore,

that statute of limitations barred prosecution for any conspiracy in which it was shown that he participated. The alleged conspiracy to bribe the East Chicago officials terminated prior to September 30, 1976.

Petitioner was confronted at the joint trial with the impossible task of defending against evidence not properly admissible against him concerning matters and transactions with which he was neither charged nor otherwise connected. It is important for this Court to realize that the direct testimony concerning petitioner consumed approximately 7 pages of a total of 7,373 pages of the transcript of the evidence. The great bulk of evidence that was presented at the joint trial, although not in any way actually connected with the petitioner, was highly prejudicial against him, in that the jurors, even after appropriate instructions, must have been unable to apply only the evidence properly before them in the consideration of petitioner's guilt or innocence. Thus, a separate trial of petitioner was and is necessary to insure that he be given a fair and impartial trial.

The testimony concerning the division of profits from the Big Job & ITAG, the payment of Wleklinski and Callahan for service not rendered, the payment to Elmer Layden for a bond that was not written, the payment of home improvements for the benefits of Hamilton and Schubert, the purchase of a horse for Cookie Leahu, the agreement to pay Hinesley and Wetterlin for false invoices, the testimony concerning the forming of Columbine One to distribute profits, the complex BESSI transactions, and the testimony concerning the failures to report alleged income of all the defendants except petitioner was highly prejudicial. No jury, even after instructions from the Court, could be expected to differentiate those facts applicable to the petitioner and all of

the evidence introduced by the Government as to the other defendants. By the end of the trial, the evidence, arguments and instructions could fairly be described as a complex maze from which an innocent defendant would find it impossible to extricate himself.

A careful search of the record at trial would disclose that the Government's evidence tended to establish that:

1. Petitioner was not present at any of the meetings in Riley Towers or at the meetings with Wetterlin's attorney.

2. He was not present at any of the meetings that Mr. Wetterlin had in the Frankfort trailer in the Spring of 1969.

3. He was not present when Hernly and Wetterlin and Leahu met in East Chicago, when Hernly put up the performance bond for Division U.

4. He was not present in the meeting at the Holiday Inn in East Chicago prior to the bid. (Tr. 2873)

5. He was not present at the Ramada Inn meeting thereafter. (Tr. 2873)

6. He was not present at any of the meetings with regard to the Wleklinski and Callahan matter in November of 1969. (Tr. 2873)

7. He was not present in Hernly's meetings in New York with Dr. Zwifle. (Tr. 2873)

8. He was not present at any meetings in Zurich in the year 1970. (Tr. 2874)

9. He was not at any meetings in Zurich; his name does not appear on any of the documents connected with the East Chicago Water Pollution Abatement project or the Sanitary District of East Chicago. (Tr. 2874)

10. His name does not appear on any of the documents in ITAG. (Tr. 2874)

11. He does not have any connection with ITAG.

12. He did not have anything to do with BESSI.

13. He did not have any connection whatsoever with the joint venture between Hernly Brothers, Inc. and Fitzgerald and Stutz.

14. He did not have any connection with the bankruptcy proceedings that BESSI underwent.

15. He was not present in February, 1970 when there was an authorization signed to be sent to ITAG to receive money.

16. He was not present in February, 1970 when Hernly gave Leahu $105,000.

17. He was not present in Zurich, Switzerland in March in 1970 when Hernly was in Zurich receiving money from ITAG.

18. He was not present in March when Hernly gave money to Leahu.

19. He was not present in June, 1970 in Zurich, Switzerland.

20. He was not present in Zurich when Hernly negotiated the rental contract with Schubert and Peduzzi.

21. He did not at any time have any connection with any of the transactions in Switzerland (55a-62a)

The situation that petitioner found himself in in this trial was very similar to the situation of Shuck in *United States v. Kelly*, 349 F.2d 720 (C.A. 1965).

". . . Shuck is in a different position, and the failure of the trial judge to recognize this difference and to take the necessary steps to protect Shuck's rights makes it necessary for us to reverse the judgment of conviction against Shuck, on the substantive counts as well as the conspiracy count, and to remand the case for a retrial as to him." 349 F.2d at 756

The Court noted that:

". . . there was evidence from which the jury might have inferred that Shuck together with Van Allen, the salesmen in Shuck's office and perhaps others conspired to undertake a pressure campaign, or "boiler room" operation to induce individual in-

vestors to buy Gulf Coast Leaseholds stock at inflated prices and hold it, the proof supporting participation by Shuck in the single, overall conspiracy alleged in the indictment is tenuous and unsubstantial. He knew nothing about the sale of the 750,000 shares of unregistered stock of the backing and filling over the debentures and their sale to Brandel Trust. Van Allen testified he did not tell Shuck that he was paying Singer, Bean & Mackie to buy Gulf Coast Leaseholds stock as it came on the market and that this was a very substantial part of the stock Shuck was to sell to the public. Moreover, the evidence that Shuck knew the information he was giving out was false is indirect and rests in good part upon the credibility of Teller, except for the post-conspiracy testimony of Kelly and Hagen before the SEC and the Attorney General of the State of New York and the letter from Kelly to Shuck concerning Clint Murchison, and this evidence was plainly inadmissible as against Shuck." 349 F.2d at 756

In explaining the necessity of severance for Shuck, the Court noted that:

"The principal and inevitable prejudice, however, was caused by the slow and inexorable accumulation of evidence of fraudulent practices by Shuck's co-defendants Kelly and Hagen. The ingenious schemes and designs they formulated to cover their tracks as well as the shameless way in which they manipulated the market, thumbed their noses at the SEC and feathered their nests at the public expense, concealing their *ill-gained payoffs by means of organizations formed under the secrecy laws of Liechtenstein and Switzerland*, must have stamped them in the eyes of the jurors as unscrupulous swindlers of the first rank. That some of this rubbed off on Shuck we cannot doubt. *When this accumulation reached its peak* in the offer into evidence of the administrative testimony of Kelly and Hagen and the letter by Kelly connected

> therewith, and this testimony and the letter were received in evidence, *it is clear to us* that the *motion then made by counsel for Shuck for a severance should have been granted.* It was an abuse of judicial discretion to deny the motion for a severance at that time." 349 F.2d at 759 (Emphasis added)

A comparison of the prejudice to Shuck in *Kelly* and the prejudice to petitioner here clearly demonstrated a need for a severance. The evidence presented concerning the division of profits from the Big Job and ITAG, the payment to Wleklinski and Callahan for services not rendered, the payment to Elmer Layden for a bond that was not written, the payment of home improvements for the benefits of Hamilton and Schubert, the purchase of a horse for Cookie Leahu, the agreement to pay Hinesley and Wetterlin for false invoices, the testimony concerning the forming of Columbine One to distribute profits, and the testimony concerning the failures to report alleged income of all the defendants except petitioner was highly prejudicial, requiring the severance of petitioner. The accumulation of the evidence inexorably damaged petitioner, so that it was an abuse of discretion for the Court to have denied his motion for severance during the trial.

Petitioner was charged in Count IX with the crime of perjury (50a-52a). Miles Hernly, the unindicted coconspirator, testified that petitioner was at a meeting on September 20 and 21, 1967, where he and Ted Leahu were present at a discussion concerning the payment of $1,000,000.00 to East Chicago officials. Hernly's testimony as to what the petitioner said and did on that occasion was unclear and contradictory, as revealed in cross examination. (Tr. 3011, 3017) Charles McKinney and Lloyd Townsend, who were both present on that occasion, do not recall seeing the petitioner (Tr. 3027-3051, 3342). The defendant, Melvin C. Wetterlin, who was pre-

sent, according to his testimony and that of Miles Hernly, testified that petitioner was not present during those meetings. (Tr. 6658-6660).

For the reasons already set forth, the trial of Count IX should have been severed from the trial of the rest of the indictment. The introduction into evidence of all the evidence not relevant to the petitioner clearly prejudiced his ability to have a fair and impartial trial on the issues in Count IX. In light of the fact that the evidence as to whether he was present on September 20 or 21, 1967 was conflicting, the admission into evidence concerning matters and transactions with which he was neither charged nor otherwise connected certainly rendered it impossible to grant him a fair and impartial trial on the matters related to Count IX.

The prejudice to defendant KOVACH required a severance of Count IX from the rest of the indictment as well as a severance of petitioner from the other defendants.

Although the Court below did not discuss this issue, its decision is in direct conflict with *United States v. Kelly, supra.* Petitioner could not have a fair trial in the face of the large accumulation of prejudicial and irrelevant evidence when he had a very slight connection with the conspiracy charged and when he was charged with a separate count of perjury.

Accordingly, petitioner respectfully submits that this Court should issue its Writ of Certiorari in order that it may decide this important question of Federal criminal law.

CONCLUSION

For the reasons severally and collectively assigned here it is respectfully prayed that this Court issue its Writ of Certiorari to review the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

GEORGE C. PONTIKES
Foss, Schuman & Drake
11 South LaSalle Street
Chicago, Illinois 60603

THOMAS BULLARD
3609 Main Street
East Chicago, Indiana 46312

Attorneys for Petitioner

APPENDIX

APPENDIX 1

United States Court of Appeals
For the Seventh Circuit

Nos. 77-1524, 77-1525, 77-1554, 77-1555 and 77-1563

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES FITZGERALD, ALFRED KOVACH, CORNEL LEAHU, CHARLES W. SCHUBERT, and ERNEST HAMILTON,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. H Cr 76 114—**Phil M. McNagny, Jr.**, *Judge.*

ARGUED APRIL 10, 1978—DECIDED JUNE 14, 1978

Before CUMMINGS and WOOD, *Circuit Judges,* and SOLOMON,* *District Judge.*

SOLOMON, *Judge.* Appellants Fitzgerald, Schubert, Hamilton, Kovach, and Leahu were charged in Count 1 with a conspiracy to use the mails in furtherance of a scheme to defraud the East Chicago, Indiana, Board of Sanitary Commissioners (Board) and the citizens of the East Chicago Sanitary District (District). Other objects

* Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

of the conspiracy were to obtain money and property through false representations and to use the facilities of interstate and foreign commerce to promote and carry on bribery contrary to Indiana law. Fitzgerald, Schubert, Hamilton, and Leahu were charged in Counts 2 to 6 with separate uses of the mails to further the scheme to defraud. They were charged in Count 8 with conspiracy to defraud the United States by obstructing the Internal Revenue Service (IRS) in the computation, assessment, and collection of taxes. Kovach was also charged with perjury before the grand jury.

After an eight-week jury trial in which none of the appellants testified, the jury convicted all appellants of all charges brought against them. On appeal, they raise a number of issues. We affirm.

I

This case involves the unlawful taking by public officials, contractors, and others of more than two million dollars ($2,000,000) from a public works project.

At the trial, the government proved that Hamilton and Schubert were the directors of RSH, Inc., an architectural, engineering, and consulting service. RSH was under contract to the Board to design an estimated fifteen million dollar sewer project (the project) to be financed by public bonds. Hamilton and Schubert recommended to the Board which bid to accept and supervised the construction. Leahu was the Superintendent of the Board. He was appointed to that position by the mayor of East Chicago. Leahu gave final approval of the bid award and all changes in the work on the project.

Kovach, a friend of Leahu's, was an East Chicago storeowner with many political connections. He was formerly an assistant to the mayor of East Chicago.

Hernly[1] was the president and director of Hernly Brothers, Inc., a construction company which was

[1] Hernly testified for the government and received immunity.

awarded the bid. Fitzgerald was the director of Fitzgerald and Stutz, Inc., a construction company which formed a joint venture with Hernly Brothers to complete the project.

Wetterlin owned a business which designed and sold engineer control systems. Hinesley was a manufacturers' representative for firms which constructed waste-water treatment equipment.[2]

BID DISCUSSIONS

The bids on the project were due on September 22, 1969. Between June and September, 1969, Hamilton, Schubert, Hernly, Wetterlin, and Fitzgerald met at least four times. They discussed Hernly Brothers' proposed bid and made a number of changes in it. They agreed that each would receive one-fifth of the project's profits, and, in return for their shares, Hamilton and Schubert would recommend that the Board accept Hernly Brothers' bid.

The group also discussed a method to secretly divide the profits and avoid income taxes (the Wetterlin plan). Wetterlin suggested that Hernly Brothers should enter into spurious consulting contracts with a foreign corporation, send money overseas as payments on the contracts, and deduct the payments as business expenses. They would then retrieve the money and divide it, free of income taxes. Hamilton and Schubert later traveled to Europe to investigate its feasibility.

PALMER HOUSE MEETING

Hernly and Wetterlin met with appellants at the Palmer House in Chicago on either September 20 or 21, 1969. This was a day or two before submission of Hernly Brothers' bid. Leahu said that he had called the meeting to "see how $1 million that was needed for East Chicago officials would be handled. . . ."[3]

---

[2] Wetterlin entered into a plea agreement, and Hinesley entered a plea of guilty.

[3] What other "East Chicago officials" were involved is unclear. The record demonstrates that Leahu received the money, but not whether he gave any of it to other officials.

Hamilton suggested the Wetterlin plan as a method of hiding a million dollars. Kovach and Leahu discussed the Wetterlin plan privately and then announced that the Wetterlin plan would be used. Appellants agreed that one million dollars would be paid to Leahu for "the East Chicago officials". In return, Hernly Brothers would be awarded the bid on the project.

Hernly was concerned about taxes on the million dollar bribe. He wanted to have another million collected to cover taxes on the first million if the IRS discovered it. Appellants agreed that the Wetterlin plan could be used to hide the second million.

Appellants also agreed to use "change orders" to generate at least the amount necessary for the bribe and tax money. The change orders were to be made in the project specifications, signed by Hamilton or Schubert, which either deleted or added items to the project. Hamilton or Schubert were to inflate the value of the additions and deflate the value of the deletions. This would produce hidden profits.

Hamilton, Schubert, Wetterlin, and Fitzgerald agreed that Hinesley would receive a $200,000 commission, the amount he lost when the parts he was to supply were deleted. Hinesley was to be placed on the Fitzgerald and Stutz payroll and paid through false invoices. Hinesley did no work for this money.

BID AWARD AND FRAUDULENT PERFORMANCE BOND

Hernly Brothers and the other bidders submitted their bids on September 22, 1969. On the following day, Hamilton and Schubert recommended to the Board that Hernly Brothers' bid be accepted. The Board tentatively awarded the contract to Hernly Brothers, on condition that Hernly obtain a suitable performance bond.

Hernly was unable to obtain a performance bond. He told this to Leahu and wanted to withdraw his bid, but he was persuaded by Leahu to let Leahu and Kovach obtain the bond. Leahu and Kovach obtained a blank Underwriters Insurance Company bond and, with

Hamilton's help, they completed it, using forged signatures. The Board accepted the fraudulent bond, and the insurance agent who provided the bond received $143,573.14 for his efforts.

Hernly Brothers was given the final award in early January 1970, and shortly thereafter formed the joint venture with Fitzgerald and Stutz.

FORMATION OF ITAG

In January 1970, Hamilton, Fitzgerald, Schubert, Wetterlin, and Hernly went to Switzerland to carry out the Wetterlin plan. They met officials of a Swiss accounting firm, Allgemeine Treuhand (Allgemeine), and agreed that Allgemeine would acquire the stock of Ingenieur Tiefbau A.G. (ITAG), a dormant Swiss corporation. The stock was divided into five equal shares and transferred in trust to Allgemeine. Allgemeine was to enter into consulting, purchase, and rental agreements on behalf of ITAG for minimum payments to ITAG of three million dollars.

Hamilton, Schubert, Wetterlin, Hernly, and Fitzgerald signed a separate agreement which provided that each of them was entitled to an equal share of ITAG stock.

In February 1970, Hernly Brothers contracted with ITAG for ITAG to provide consulting services for $80,000 a month. Project funds were used to pay the fee to ITAG, but ITAG provided no services. In June 1970, Hernly and Schubert contracted with ITAG for the rental of sheet welding equipment at $35,000 a month for twenty months. Some equipment was shipped to East Chicago but never used. Project funds again supplied the rental fee.

From February 1970, until November 1971, Hernly Brothers paid about $2.3 million to ITAG out of project funds generated mainly through the fraudulent use of change orders. The cash was usually carried by hand to Zurich; checks were either hand-carried or mailed.

From February 1970, until June 1971, Hernly, Hamilton, Schubert, Fitzgerald, and Wetterlin re-

trieved from ITAG in Switzerland one million dollars which was paid to Leahu. In November 1971, Hinesley retrieved $35,000 from ITAG, out of which he paid $25,000 to Schubert. In October 1971, in Zurich, Hamilton received an ITAG accounting, and in January and February 1972, Hernly mailed letters to ITAG which stated that Hernly Brothers' intended to pay ITAG $20,000 and $30,000 to complete the contracts. The Swiss connection was shut down in early 1972.

COLUMBINE I AND DIVISION OF PROFITS

The net "profit" on the project exceeded six million dollars. Hamilton and Schubert wanted to receive their shares tax-free or at a reduced tax rate and suggested investing the profits in oil properties. In April 1971, Fitzgerald and Stutz and Hernly Brothers formed a joint venture with BESSI, a Denver-based investment firm. The joint venture was called Columbine I, and it was formed to transfer profits from Hernly Brothers to Hamilton and Schubert. Hernly Brothers and Fitzgerald and Stutz (the limited partners) contributed $3.2 million of project profits to BESSI (general partner) for investment for exploring and developing oil producing properties. Forty percent of the profit from the investments was to be paid to Hamilton and Schubert for their one-fifth shares of the sewer project profits.

In January 1972, Hamilton and Schubert sold their interests in Columbine I to BESSI in exchange for promissory notes valued at $1,090,930 each. In December 1972, BESSI filed a petition in bankruptcy. Hamilton and Schubert compromised their claims against it for about $75,000.

Wetterlin did not receive any of his share of the sewer project profits.

PROGRESS ON THE PROJECT AND ITS COMPLETION

Hamilton and Schubert authorized five change orders before June 30, 1971, when the project was substantially

completed, and later they authorized a sixth change order. The second and fifth change orders, signed and approved by Hamilton, generated most of the two million dollar bribe and tax money.

After June 30, 1971, except for the sixth change order, Hernly Brothers and Fitzgerald and Stutz did only maintenance work on the project. The sixth change order, completed in August 1973, substituted other work for nineteen uncompleted items. The contractors received no additional money for this work.

II

CONTENTIONS

One or more of the appellants raise the following specifications of error: (1) there was a fatal variance between the indictment and the evidence in Count 1, where the proof showed a number of minor conspiracies rather than one overall conspiracy as alleged; (2) the statute of limitations ran on Counts 1 through 6; (3) Leahu was not a "bribeable official" under Indiana law; (4) co-conspirators' out-of-court statements were erroneously admitted into evidence; (5) the cross-examination of Hernly was erroneously limited; and (6) appellants were prejudiced because the court misinformed counsel of its action on requested jury instructions.

III

SINGLE CONSPIRACY

The plan of action and the agreements entered into by Wetterlin and Hernly and all of the appellants at the Palmer House meeting established a basis for the jury to find one overall conspiracy. At that meeting the parties agreed: (1) that Leahu would receive a million dollar bribe in breach of his fiduciary duties to the Board and District; (2) that Hamilton and Schubert would breach their duty to protect the Board's and District's interests in the performance of the project by, among other things, dividing the profits with the general contractor;

and (3) that the Wetterlin plan would be used to hide money and avoid taxes.

This was a complex conspiracy which included minor or subsidiary agreements, each one of which involved some but not all of the conspirators. It is immaterial that each of the appellants did not participate in all the activities or even know all the details of the conspiracy. *Blumenthal v. United States*, 332 U.S. 539, 557-58 (1947); *United States v. Hickey*, 360 F.2d 127, 138 (7th Cir.), *cert. denied*, 385 U.S. 928 (1966); *United States v. Bastone*, 526 F.2d 971, 981 (7th Cir. 1975), *cert. denied*, 425 U.S. 973 (1976). They are bound as long as the results fall within the common purposes of the conspiracy and appellants knowingly contributed toward its furtherance. *United States v. Greer*, 467 F.2d 1064 (7th Cir. 1972), *cert. denied*, 410 U.S. 929 (1973). As in *Blumenthal*, each subsidiary agreement here was a step in the formation of a larger conspiracy with common goals.

STATUTE OF LIMITATIONS

Kovach and Leahu contend that their prosecution is time-barred because they were indicted on September 30, 1976, which was more than five years after the bribery conspiracy had been completed. The other appellants contend that the overt acts within the limitations period relate only to ITAG transactions, BESSI transactions, and the final change order—none of which had "any relationship . . . to the core fraud against the Sanitary District."

These contentions are based on the assumption that there were a number of separate conspiracies or that the objects of the conspiracy were entirely separable and distinct. We have already rejected those contentions.

The applicable statute of limitations for the crimes charged in Counts 1 through 6 is five years. 18 U.S.C. § 3282. There were a number of overt acts which took place within the limitations period. The jury could have reasonably found that any of these acts were in furtherance of the conspiracy. These include:

1. *The continued use of ITAG.* On November 5, 1971, Hinesley, pursuant to an authorization for release of ITAG funds, traveled to Switzerland and received $35,000, $25,000 of which he paid to Schubert. He kept the remaining $10,000 as part of his "commission". Several months later Hernly sent letters to ITAG which terminated the consulting contract.

The Wetterlin plan and the ITAG structure were necessary to hide the money. Without them it would have been difficult to hide or pay the bribe money and the tax money or to share the profits with Hamilton and Schubert. This complicated system of concealment was a part of appellants' agreements from the beginning.

The jury could reasonably conclude that these acts of concealment were "done in furtherance of the *main* criminal objectives of the conspiracy." *Grunewald v. United States*, 353 U.S. 391, 405 (1957).

2. *Columbine I.* In 1971 the Columbine I joint venture was formed by Fitzgerald and Stutz and Hernly Brothers with BESSI. This was the vehicle by which Hamilton and Schubert were to receive their shares of the profits. During 1971 and 1972, Hamilton and Schubert received approximately $30,000 from the Columbine I investments. In December 1972, they received about $75,000 in compromise of their bankruptcy claims.

LEAHU WAS A "BRIBEABLE OFFICIAL"

The use of interstate and foreign commerce facilities to carry on bribery in violation of Indiana law was one of the objects of the conspiracy. Appellants contend that they could not have conspired to bribe Leahu because he was not a "bribeable official" under Indiana law. Ind. Code §§ 35-1-90-4, 35-1-101-9 (1971) (repealed 1977). Section 35-1-90-4 made it unlawful to bribe any "employee of a political subdivision of [Indiana]." Section 35-1-101-9 made it unlawful to bribe any person holding "any lucrative office, or appointment or agency under the Constitution or any law of the State of Indiana for the purpose of procuring [a] public contract. . . ."

Appellants contend that because an Indiana sanitary district is not a municipal corporation for the purpose of the state constitution's two percent tax limitation provision, it is not a political subdivision under section 35-1-90-4. There is no merit in this contention. Neither is there merit in appellants' contention that Leahu's position as sanitary district superintendent was not a "lucrative office, appointment or agency" within section 35-1-101-9 because sanitary board superintendent is not a "lucrative office or appointment" within the meaning of Art. 2, § 9 of the Indiana Constitution.

The Indiana legislature did not intend to create an entity separate from municipalities when it created sanitary districts. *See Archer v. City of Indianapolis*, 233 Ind. 640, 122 N.E.2d 607, 610-11 (1954). Like the chief of police and other department heads appointed by the mayor, Leahu was a public officer and an employee of the municipality. *See State v. Carey*, 241 Ind. 692, 175 N.E.2d 354 (1961); *Klink v. State ex rel. Budd*, 207 Ind. 628, 194 N.E. 352 (1935); *Archer, supra.* As such, he was a bribeable official under Indiana law.

ADMISSION OF CO-CONSPIRATORS' OUT-OF-COURT STATEMENTS

Appellants contend that out-of-court statements made by Fitzgerald to Price Waterhouse & Co. auditors were improperly admitted.

In 1972, after the formation of Columbine I, BESSI proposed an SEC registration. Price Waterhouse & Co. was requested to make an audit which included a five-year earnings history of Hernly Brothers and Fitzgerald and Stutz. Over appellants' objections, Price Waterhouse employees were permitted to testify about statements made to them by Fitzgerald during the audit.

Price Waterhouse employees testified that Fitzgerald told them that:

1. Legal fees paid under the table to assure there would be no trouble with the municipal bonds were a "cost of doing business";

2. A politician told him where to secure the performance bond;

3. The Columbine I profits distributed to Hamilton and Schubert was a "stupid mistake", having nothing to do with the project;

4. He (Fitzgerald) had no ownership interest in ITAG, and the ITAG contracts were negotiated by unrelated parties;

5. The large profit on the project was generated by service and a machine from ITAG, a good economic situation, and earlier completion than expected; and

6. The project had received engineering services from ITAG.

The court instructed the jury that it could consider this testimony against all defendants named in Count 8, but only against Fitzgerald in Count 1.

Appellants argue that these statements were inadmissible hearsay because they were not made during the course of or in furtherance of the conspiracy. They assert that Fitzgerald made the statements to cover up after the Count 1 and Count 8 conspiracies had achieved their main goals. *Grunewald, supra,* 353 U.S. at 405.

Fitzgerald's statements as they relate to Count 1 were admitted against him only, and the jury was so instructed. The limitation was more than appellants were entitled to because from this and other evidence, the jury was entitled to conclude that they were made in furtherance of the Count 1 conspiracy.

Count 8 charged that appellants (with the exception of Kovach) conspired to defraud the IRS by reporting ITAG payments and personal expenses as business expenses on the 1970, 1971, and 1972 partnership tax returns for the Hernly Brothers-Fitzgerald and Stutz joint venture. In our view, there is a sufficient basis to find Fitzgerald's statements were made in furtherance of this conspiracy.

Nevertheless, even if it was error to admit them, the error was harmless. The existence of the Count 8 con-

spiracy and each conspirator's involvement was established by overwhelming evidence. Fitzgerald's statements added nothing substantial, and their effect was minimal in the light of all of the other evidence. *United States v. Smith*, 550 F.2d 277, 282 (5th Cir. 1977); *United States v. Williams*, 548 F.2d 228, 232 (8th Cir. 1977).

LIMITATION ON THE CROSS-EXAMINATION OF HERNLY

Appellants contend that their sixth amendment confrontation rights were violated because their cross-examination of Hernly was limited.

In September, 1972, Hernly retained an attorney to advise him on his criminal liability from transactions with his co-conspirators.

In July, 1975, the government granted Hernly immunity, and shortly thereafter he was interviewed by Justice Department lawyers.

On cross-examination, Schubert's counsel asked Hernly:

> "Did Mr. Tabbert [the attorney] advise you as to what criminal penalties you were facing?"
>
> "Did you know in 1972 and 1973 what criminal penalties you were facing?"
>
> "Why did you make an agreement with the government?"
>
> "Was the number of years that you could possibly get in prison ever discussed with you?"

The government objected to each question, and each objection was sustained. Appellants contend that this limitation on their cross-examination violated their confrontation rights because they were not allowed to fully demonstrate Hernly's bias.

A defendant may not be deprived of the right of "effective" cross-examination when he is attempting to show bias on the part of a government witness. *Davis v. Alaska*, 415 U.S. 308, 318 (1974). But a trial court has

wide discretion to limit cross-examination, particularly when further cross-examination into the witness' subjective thoughts would not be meaningful because of previous testimony revealing the witness' bias. *Bastone, supra*, 526 F.2d at 981.

The question is whether the jury had sufficient information to make a discriminating appraisal of the witness' motives and bias. *United States v. Campbell*, 426 F.2d 547, 550 (2d Cir. 1970).

Hernly testified for eleven days. He was exhaustively cross-examined on: his receipt of immunity; subsistence and expense payments from the government; his personal and corporate liability for civil tax assessments and fraud penalties; his tax liability, as well as that of his brothers; the attempts he made to get immunity for his Swiss associates; and his remaining interests in ITAG and BESSI.

The jury had ample information on Hernly's receipt of immunity and the benefits he derived from immunity. The court did not abuse its discretion when it sustained objections to these four questions.

MISINFORMING COUNSEL OF COURT'S ACTION ON REQUESTED JURY INSTRUCTIONS

Appellants contend they were deprived of the opportunity to make effective jury arguments on the statute of limitations issue because the court misinformed them on the instructions it proposed to give on that subject.

The court held three instruction conferences. During the conference held after counsel's arguments to the jury, the court modified its previous position. It informed counsel that it would give Hamilton's requested instruction on concealment and its own instruction on the statute of limitations.

This was a complex eight week trial. There were two conspiracy counts and six substantive counts. Many witnesses testified, and many exhibits were admitted. The court ordered the parties to submit their requested jury instructions no later than one week before the trial. Only the government complied.

After two weeks of trial, the court again requested instructions, and noted that the case was very complicated. Three defendants submitted their proposed instructions one week later. The instructions in issue here were submitted by Hamilton about nine weeks after they were ordered to be filed, five weeks after the court again requested them and one day before final arguments.

If requests for jury instructions are to be of real help to the trial court, they must be filed early enough to enable the court to fully consider them. Here the court had no such opportunity because the requests were not timely filed. It would not have been error for the court to have rejected them. *United States v. Tourine*, 428 F.2d 865 (2d Cir. 1970), *cert. denied sub nom. Burtman v. United States*, 400 U.S. 1020 (1971).

Appellants contend that if the court had informed them earlier that it would give these instructions, they would have argued the case differently. Even if that were true, appellants' own failure to timely file their requests was largely responsible for the situation about which they now complain. But the record shows that counsel fully argued the issues relating to the statute of limitations and concealment, the matters covered by the instructions. There was no prejudice here. *United States v. Pommerening*, 500 F.2d 92 (10th Cir.), *cert. denied*, 419 U.S. 1088 (1974).

OTHER ISSUES

We have studied all of the other claims of error. None of them have merit, and most of them are frivolous. The appellants had fair trials and the jury's verdicts were based on evidence establishing their guilt beyond all reasonable doubt.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

June 14, 1978

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. GUS J. SOLOMON, *District Judge**

Nos. 77-1524, 77-1525, 77-1554, 77-1555 and 77-1563

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

CHARLES FITZGERALD, ALFRED KOVACH, CORNEL LEAHU, CHARLES W. SCHUBERT and ERNEST HAMILTON,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. H Cr 76 114 — Phil M. McNagny, Jr., Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, in accordance with the opinion of this Court filed this date.

* The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, is sitting by designation.

APPENDIX 3

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

July 31, 1978.

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. GUS J. SOLOMON,* *Senior District Judge*

Nos. 77-1524, 77-1525, 77-1554, 77-1555 and 77-1563

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

CHARLES FITZGERALD, ALFRED KOVACH, CORNEL LEAHU, CHARLES W. SCHUBERT and ERNEST HAMILTON,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. H Cr 76 114 — Phil M. McNagny, Jr., Judge.

ORDER

Appellants filed petitions for rehearing calling attention to errors which were inadvertently included in the Court's opinion dated June 14, 1978.

To correct those errors, It Is Ordered that the opinion be amended as follows:

1. Delete from page 2: "He was appointed to that position by the mayor of East Chicago."

* The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

2. Delete, beginning on page 10, the paragraphs which start with "Appellants contend that because an Indiana sanitary district. . ." and "The Indiana legislature did not intend to create. . .".

3. Insert, in the place of the two paragraphs deleted beginning on page 10, the following:

> "Appellants contend that because an Indiana sanitary district is not a municipal corporation within the meaning of the two percent tax limitation provision of the Indiana State Constitution, Leahu as Superintendent was not an employee of a political subdivision. There is no merit in this contention.
>
> "In *Archer* v. *City of Indianapolis,* 233 Ind. 640, 122 NE.2d 607, 610-611 (1954) the Court held that sanitary district bonds payable out of a special tax did not create indebtedness of the municipality served by the sanitary district. Nevertheless, the Court observed that the sanitary district functioned as an agency of the city. The sanitary district is under the control of a Board whose members are appointed and subject to removal by the mayor. The Board acts in the name of the City when it brings or defends an action and when it issues bonds.
>
> "We hold that as an employee of the Board, Leahu was an employee of the City and therefore a bribeable official under Indiana law."

The petitions for rehearing are otherwise denied.

On appellant Kovach's suggestion for rehearing en banc, no judge in active service has requested a vote thereon, and the judges on the original panel have voted to deny a rehearing.

It Is Therefore Ordered that the suggestion for a rehearing en banc is rejected and the petitions for rehearing are denied.

The application to stay the mandate is denied, and the mandate shall issue forthwith.

APPENDIX 4

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
Hammond Division

UNITED STATES OF AMERICA

v.

ERNEST R. HAMILTON, CHARLES W. SCHUBERT, CORNEL A. LEAHU, MELVIN C. WETTERLIN, CHARLES C. FITZGERALD, ALFRED KOVACH, and LAURANCE HINESLEY

NO. HCR 76-114
VIO.: Title 18, United States Code, Sections 371, 1341, 1952 and 1623

The SEPTEMBER 1975 GRAND JURY charges:

1. At all times pertinent to this indictment the East Chicago, Indiana, Board of Sanitary Commissioners, hereinafter referred to as Board, was a local government entity created, empowered, and organized under the laws of the State of Indiana and the code of the City of East Chicago, having appointed officials and employees empowered and authorized to administer the affairs of the Board.

2. At all times pertinent to this indictment, the Board nd its officials were empowered by law to contract for, direct, oversee and supervise the planning, design, construction, and certification of construction and expenditures, relating to sewage disposal plants, intercepting sewers and all appurtenances necessary or

useful and convenient for the collection and treatment, purification and disposal of liquid and solid waste and refuse of the Sanitary District.

3. During the time pertinent to this indictment defendant Cornel A. Leahu was employed by the Board as Superintendent of the East Chicago Sanitary District, hereinafter referred to as the District, and was responsible for conducting the operations of the District.

4. At all times pertinent to this indictment, Russell, Schubert, Hamilton and Associates, Inc., which became RSH Associates, Inc. on April 24, 1970, and is hereinafter referred to as RSH, Inc., was an Indiana corporation engaged in the business of providing architectural and engineering consulting services.

5. At all times pertinent to this indictment, defendants Ernest R. Hamilton and Charles W. Schubert were directors and owners of RSH, Inc. and conducted its affairs.

6. During the time pertinent to this indictment, Hernly Brothers, Inc. and Fitzgerald and Stutz, Inc. were Indiana corporations, engaged in the construction business.

7. During the time pertinent to this indictment, Miles A. Hernly was President and Director of Hernly Brothers, Inc. and conducted its affairs. Charles C. Fitzgerald was President and Director of Fitzgerald and Stutz, Inc. and conducted its affairs.

8. During the time pertinent to this indictment, defendant Melvin C. Wetterlin was owner and operator of Wetterlin Engineering Sales, Inc., an Indiana corporation, engaged in the busines of selling and designing

engineer control systems for industrial, municipal, and commercial installations.

9. During the time pertinent to this indictment Laurance Hinesley was a manufacturers representative for firms involved in the sale of waste-water treatment equipment.

10. At all times pertinent to this indictment, Title 35, Article 1, Chapter 90, Section 4, Indiana Revised Statutes, entitled: *Bribery of public officers—Corruption*—provided in pertinent part:

> Whoever corruptly gives, promises or offer(s) . . . to any employee of any municipal corporation, or political subdivision of this state . . . any money or valuable thing, or corruptly offers or promises to do any act beneficial to any such person, to influence his action, vote, opinion or judgment in any matter pending or that might legally come before him; and whoever being . . . (an) employee of any municipal corporation or any political subdivision of this State, . . . either before or after his . . . qualification, appointment, or employment, solicits or accepts any such money, promise or valuable thing, to influence him with respect to his official duty, or employment, or to influence his action, vote, opinion or judgment in any matter pending or that might legally come before him, shall be . . . (guilty of an offense).

11. At all times pertinent to this indictment, Title 35, Article 1, Chapter 90, Section 5, Indiana Revised Statutes, entitled: *Bribery of . . . township trustees . . . — Corruption*—provided in pertinent part:

> Whoever, with intent to corrupt a(n) . . . officer of any city, . . . either before or after he . . . (is) appointed, qualified or sworn, promises or offers him . . . any money or valuable thing; and whoever, either before or after he is . . . appointed, qualified

or sworn as an . . . officer of any city . . . solicits or accepts any money or other valuable thing to influence him with respect to the discharge of his duties as such, shall be (guilty of an offense).

12. At all times pertinent to this indictment, Title 35, Article 1, Chapter 101, Section 9, Indiana Revised Statutes, entitled: *Public contracts—Bribery of officer to procure*—provided in pertinent part:

> Any person or agent who shall pay or agree to pay any money, bonus, fee, commission, or deliver or give anything of value in any sum to the value of more than two hundred dollars ($200) to any . . . person holding any lucrative office, or appointment or agency under the Constitution or any law of the State of Indiana, for the purpose of procuring any contract for the construction of any . . . public work, or the furnishing of any material or performance of any work for the use of said state, over which said official has any authority or jurisdiction or whoever whether in person or by agent or the agent himself, shall obtain any such contract and shall thereafter pay or agree to pay any such person or officer any money, bonus, fee, commission, percentage, reward, drawback, premium, profit, or other thing of value in any sum to the value of over two hundred dollars ($200), . . . shall be (guilty of any offense).

13. At all times pertinent to this indictment, Title 18, Article 1, Chapter 2, Section 4, Burns Indiana Revised Statutes, entitled: *City contracts—Interest forbidden*—provided in pertinent part:

> No . . . employee of any city or incorporated town of this state, shall, either directly or indirectly, be a party to, or in any manner interested in, any contract or agreement, either with such city or incorporated town, or with any officer, board, clerk, deputy or employee of such city or incorporated town, for any matter, cause or thing by which any liability or indebtedness is in any way or manner created or passed upon, authorized or approved by . . . any officer, board, clerk, deputy or employee of

such city or incorporated town . . .; or any person violating any of such provisions shall be (guilty of an offense).

14 At all times pertinent to this indictment, Title 35, Article 1, Chapter 101, Section 7, Indiana Revised Statutes, entitled: *Officers interested in public contracts*— provided in pertinent part:

> Any . . . township or town trustee, (or) mayor, . . . or their appointees or agents, . . . or any person holding a lucrative office under the Constitution or laws of this State, who shall, during the time he may occupy such office or hold such appointing power and discharge the duties thereof, be interested, directly or indirectly, in any contract for the construction of any . . . public building or work of any kind, erected or built for the use of . . . any county, township, town or city in the state, in which he excercises any official jurisdiction, or who shall bargain for or receive any . . . profit or money whatever, or any contract, . . . shall be guilty (of an offense), and disfranchised and rendered incapable of holding any office of trust or profit for any determinate period.

15. On or about April 11, 1966, The Board and RSH, Inc. entered into and executed a contract whereby RSH, Inc. was commissioned to make a survey and report on the needs for additions to the sewage works and sewage system of the City of East Chicago, Indiana, in order to assist in the abatement of domestic and industrial liquid waste pollution of Lake Michigan and the Grand Calumet River.

16. On or about August 7, 1967, the Board and RSH, Inc. entered into and executed a contract whereby RSH, Inc. would serve as the Board's professional representative in the planning and inspection of construction for the East Chicago Water Pollution Abatement Project; prepare the necessary project design

surveys, preliminary drawings and construction costs estimates; prepare project working drawings, specifications, and contract documents including performance and maintenance bonds; act as the Board's representative at the project site to issue instructions to the contractor and prepare change orders as required; safeguard generally the interests of the Board; determine the amounts owing to the contractors and approve in writing to the Board payments in those amounts; and perform such other duties on behalf of the Board as defined by the contract and provided for by law.

17. On or about September 22, 1969, the Board met and received bids for the East Chicago, Indiana, Water Pollution Abatement Project, Contract Number 67-5144, hereinafter referred to as sewer project, which sewer project was financed by sale of district bonds in the amount of seventeen million dollars ($17,000,000) on or about November 20, 1969.

18. On or about September 23, 1969, the Board met and tentatively awarded the sewer project contract to Hernly Brothers, Inc. at a cost of fourteen million, two hundred and eighty seven thousand, three hundred and fourteen dollars and forty cents ($14,287,314.40).

19. On or about January 12, 1970, a performance bond issued in the name of Hernly Brothers, Inc. was accepted by the Board, which performance bond was intended to insure satisfactory completion of the sewer project.

20. On or about January 5, 1970, the final contract for the sewer project was entered into and executed by and between Hernly Brothers, Inc. and the Board, whereby Hernly Brothers, Inc. became contractor for construction of the sewer project.

21. On or about September 1969, Hernly Brothers, Inc. and Fitzgerald and Stutz, Inc. agreed to perform the sewer project contract as a joint venture, which joint venture agreement subsequently was reduced to writing and made effective as of February 1, 1969.

22. From on or about April 11, 1966, up to and including the date of this indictment, in the Northern District of Indiana, and elsewhere,

ERNEST R. HAMILTON,
CHARLES W. SCHUBERT,
CORNELL A. LEAHU,
MELVIN C. WETTERLIN,
CHARLES C. FITZGERALD,
ALFRED KOVACH, and
LAURANCE HINESLEY

defendents herein, and Miles A. Hernly, named herein as co-conspirator but not as a defendant, unlawfully, knowingly and wilfully did combine, conspire, confererate and agree together, with each other and with other persons, to commit the following offenses against the United States:

(1) Devising a scheme and artifice:

(a) To defraud the East Chicago, Indiana Board of Sanitary Commissioners and the citizens of the East Chicago, Indiana, Sanitary District, of their right to have the District's business and its affairs conducted honestly, impartially, free from bribery, corruption, collusion, fraud, undue influence, dishonesty, conflict of interest, and in accordance with the laws of the State of Indiana;

(b) To defraud the East Chicago, Indiana Board of Sanitary Commissioners and the citizens of the East Chicago, Indiana, Sanitary District of their right to the conscientious, loyal, faithful, disinterested, and unbiased services of Cornel A. Leahu, Ernest R. Hamilton, and Charles W. Schubert, in the performance of acts related to their official duties, functions, and employment;

(c) To defraud the East Chicago, Indiana Board of Sanitary Commissioners and the citizens of the East Chicago, Indiana, Sanitary District, of certain secret monies obtained by and expended on behalf of Cornel A. Leahu, Ernest R. Hamilton, and Charles W. Schubert as a result of their positions and conduct as public officials and employees; and

(d) To obtain money and property by means of false and fraudulent pretenses and representations;

for the purpose of executing such scheme and artifice to knowingly and wilfully cause the United States mails to be used in furtherance of the scheme and artifice to defraud, in violation of Title 18, United States Code, Section 1341.

(2) Traveling in interstate and foreign commerce and using the facilities in interstate and foreign commerce, including the mail with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, that is, bribery, in violation of the laws of Indiana, the state in which the bribery was committed, that is Burns Indiana Statutes, Title 35, Article 1, Chapter 90, Sections 4 and 5; and Title 35, Article 1, Chapter 101, Section 9, and thereafter performing acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of the unlawful activity, in violation of Title 18, United States Code, Section 1952.

23. It was a part of the conspiracy that Ernest R. Hamilton, Charles W. Schubert, Melvin C. Wetterlin, Charles C. Fitzgerald, and Laurance Hinesley, would and did meet with Miles A. Hernly to discuss sewer project design, specifications, equipment, bids, and contracts, and would and did assist in the preparation of the bid submitted by Hernly Brothers, Inc. for construction of the sewer project.

24. It was a part of the conspiracy that Ernest R. Hamilton and Charles W. Schubert would and did utilize their position and influence as consulting engineers and professional representatives of the Board on the sewer project, to recommend Board acceptance of the Hernly Brothers, Inc. bid.

25. It was a part of the conspiracy that Cornel A. Leahu, Ernest R. Hamilton, Charles W. Schubert and Charles C. Fitzgerald, knowing that Underwriters Insurance Co., had not authorized any performance bond for Hernly Brothers, Inc., would and did prepare and cause to be prepared, a false and fraudulent performance bond which performance bond would appear to be issued to Hernly Brothers, Inc. by Underwriters Insurance Co. and which performance bond was a condition precedent to final Board acceptance of the Hernly Brothers, Inc. bid.

26. It was a part of the conspiracy that Ernest R. Hamilton, Charles W. Schubert, Melvin C. Wetterlin, Charles C. Fitzgerald, and Miles A. Hernly would and did agree to divide equally among themselves, the profits from the sewer project.

27. It was a part of the conspiracy that Alfred Kovach and Cornel A. Leahu would and did solicit one million dollars ($1,000,000) of sewer project funds which they represented would be for the benefit of East Chicago public officials.

28. It was a part of the conspiracy that one million dollars ($1,000,000) would be and was paid to, given over, and accepted by Cornel A. Leahu, which money derived from sewer project funds with Leahu's knowledge and consent, and which money was to be and was received and accepted by Cornel A. Leahu to influence him and others in the performance of official duties and

employment, and which payments Cornel A. Leahu was not authorized by law to accept.

29. It was a part of the conspiracy that approximately one hundred and forty-three thousand, five hundred and seventy-three dollars and fourteen cents ($143,573.14) would be and was paid to, given over, and accepted by Elmer F. Layden, Jr., an independent insurance agent, as premium payments for the fraudulent performance bond.

30. It was a part of the conspiracy that Ernest R. Hamilton and Charles W. Schubert would and did submit and cause to be submitted to Hernly Brothers, Inc., invoices which purported to be for goods and services provided to the sewer project, knowing that these invoices would be paid from sewer project funds, which goods and services had been received by Ernest R. Hamilton and Charles W. Schubert for their personal benefit, and which goods and services were solicited, received and accepted by Earnest R. Hamilton and Charles W. Schubert to influence them in the performance of their duties and employment, and which goods, services and payments, they were not authorized to receive.

31. It was a part of the conspiracy that Laurance Hinesley would and did submit and cause to be submitted to Hernly Brothers, Inc., invoices which purported to be for goods and services provided to the sewer project, knowing that these invoices would be paid from sewer project funds, which goods and services were never provided to the sewer project, and which payments were received and accepted by Laurance Hinesley for his personal benefit.

32. It was a part of the conspiracy that Laurance Hinesley would be placed on the Fitzgerald and Stutz,

Inc. sewer project payroll from April 9, 1970 through March 25, 1971, and would and did receive approximately five hundred and forty dollars ($540) per week net salary, for which he performed no work.

33. It was a part of the conspiracy that Ernest R. Hamilton, Charles W. Schubert, Melvin C. Wetterlin, Charles C. Fitzgerald and Miles A. Hernly each would and did become a 20% owner in Ingenieur Tiefbau, A. G., a Swiss corporation, hereinafter referred to as ITAG.

34. It was a part of the conspiracy that the ITAG stock would be held in trust in Switzerland for the benefit of Ernest R. Hamilton, Charles W. Schubert, Charles C. Fitzgerald, Melvin C. Wetterlin and Miles A. Hernly.

35. It was a part of the conspiracy that Hernly Brothers, Inc. would and did enter into a contract with ITAG, whereby Hernly Brothers, Inc. was obligated to pay ITAG eighty thousand dollars ($80,000) per month for a period of twenty-four months for engineering consulting services, which contract would serve as a pretext for transmittals of sewer project funds to ITAG, and which services were never performed or intended to be performed.

36. It was a part of the conspiracy that Hernly Brothers, Inc. would and did enter into a contract with ITAG, whereby Hernly Brothers, Inc. was obligated to pay ITAG thirty-five thousand dollars ($35,000) per month for a period of approximately nineteen months for welding equipment rental which contract would serve as a pretext for transmittals of sewer project funds to ITAG, and which equipment was never used or intended to be used in the construction of the sewer project.

37. It was a part of the conspiracy that Ernest R. Hamilton, Charles W. Schubert, Melvin C. Wetterlin, Charles C. Fitzgerald and Miles A. Hernly would and did cause invoices, documents, and correspondence to be placed in the United States mails and sent and delivered by the U.S. Postal Service to and from Hernly Brothers, Inc. and ITAG, which documentation was intended to and would appear to support transmittals of sewer project funds to ITAG as payment for services and rental as described in paragraphs 35 and 36 herein, and which documentation was intended to and did conceal the true purposes for these transmittals of sewer project funds to ITAG.

38. It was a part of the conspiracy that expenditures to ITAG pursuant to the service and rental contracts denoted to paragraphs 35 and 35 herein, would be and were utilized as follows:

(a) One million dollars ($1,000,000) to be returned to the United States in cash for payment to Cornel A. Leahu as denoted in paragraph 27 herein.

(b) One million dollars ($1,000,000) to be retained in Switzerland for payment of Hernly Brothers, Inc. United States taxes if payments to ITAG were disallowed by the Internal Revenue Service; and if not so expended, to be divided equally among Ernest R. Hamilton, Charles W. Schubert, Melvin C. Wetterlin, Charles C. Fitzgerald and Miles A. Hernly.

(c) Payment of management and accounting fees to Swiss managers.

(d) Remainder to be divided equally among Ernest R. Hamilton, Charles W. Schubert, Melvin C. Wetterlin, Charles C. Fitzgerald and Miles A. Hernly.

39. It was a part of the conspiracy that Ernest R. Hamilton, Charles W. Schubert, Melvin C. Wetterlin, Charles C. Fitzgerald and Miles A. Hernly would and

did cause their ownership interest in ITAG and the true reasons for expenditures to ITAG, to be misrepresented to, and hidden and concealed from the Board and the citizens of the District.

40. It was a part of the conspiracy that Ernest R. Hamilton, Charles W. Schubert and Laurance Hinesley would and did cause the true purposes for the payments pursuant to false invoices and payroll denoted in paragraphs 30 through 32 herein, to be misrepresented to, and concealed and hidden from the Board and the citizens of the District.

41. It was a part of the conspiracy that Ernest R. Hamilton and Charles W. Schubert would and did utilize their position and influence as consulting engineers and professional representatives of the Board on the sewer project, and that Cornel A. Leahu would and did utilize his position and influence as Superintendent of the District, to initiate, draft, promote, recommend, and approve the preparation, submission, and passage of certain change orders, which change orders would and did authorize expenditures of additional funds for sewer project construction, well knowing and intending that the additional funds so generated would be transmitted to ITAG pursuant to contracts outlined in paragraphs 35 and 36 herein, and utilized as outlined in paragraph 38 herein.

42. It was a part of the conspiracy that Ernest R. Hamilton and Charles W. Schubert would and did utilize their position and influence as consulting engineers and professional representatives of the Board on the sewer project, and that Cornel A. Leahu would and did use his position and influence as Superintendent of the District, to recommend, authorize and approve periodic estimates for partial payments from District funds to Hernly Brothers, Inc., well knowing that included in

these payments were expenditures for a fraudulent performance bond, and fraudulent payroll, invoices, billings and contracts as denoted in paragraphs 29 through 32, 35 and 36 herein, and which expenditures they knew were for their own personal benefit and the personal benefit of others.

43. It was a part of the conspiracy that Hernly Brothers, Inc. and Fitzgerald and Stutz, Inc. would and did enter into and execute an agreement with Basic Earth Science Systems, Inc., of Denver, Colorado, hereinafter referred to as BESSI, which agreement created a partnership known as Columbine I.

44. It was a part of the conspiracy that Hernly Brothers, Inc. and Fitzgerald and Stutz, Inc., would and did invest approximately 3.2 million dollars of sewer project profits into Columbine I to be expended in the acquisition, exploration, development, operation and production of mineral properties.

45. It was a part of the conspiracy that Ernest R. Hamilton and Charles W. Schubert each would and did receive an undivided one-half interest in an overriding royalty interest equal to 40% of the net operating profits in all properties owned and to be acquired by Columbine I.

46. It was a part of the conspiracy that the overriding royalty interest referred to in paragraph 45 herein, would be and was held in trust by Jordan R. Smith, then an officer of BESSI, for the benefit of Charles W. Schubert and Ernest R. Hamilton.

47. It was a part of the conspiracy that Ernest R. Hamilton, Charles C. Schubert, Melvin C. Wetterlin, Laurance Hinesley. and Miles A. Hernly would and did travel and use facilities in interstate and foreign

commerce, for the purpose of obtaining money for payment to public officials and employees.

48. In furtherance of the conspiracy and to effect the objects thereof, the conspirators committed the . . . (copy distorted) acts, among others:

(1) In or about J. . . (copy distorted) 1969, Ernest R. Hamilton, Charles W. Schubert, Charles C. Fitzgerald, Melvin C. Wetterlin and Miles A. Hernly met and had a conversation in Indianapolis, Indiana.

(2) In or about July . . . (copy distorted), Ernest R. Hamilton, Charles W. Schubert, Charles C. Fitzgerald, Melvin C. Wetterlin and Miles A. Hernly met and had a conversation in Minneapolis - St. Paul, Minnesota.

(3) In or about September 1969, and prior to September 22, 1969, Ernest R. Hamilton, Charles W. Schubert, Charles C. Fitzgerald, Melvin C. Wetterlin, Laurance A. Hinesley and Miles A. Hernly met and had conversations in Indianapolis, Indiana.

(4) In or about September 1969, Charles W. Schubert and Ernest R. Hamilton traveled to Zurich, Switzerland.

(5) In or about September 1969, Charles C. Fitzgerald, Melvin C. Wetterlin, Charles W. Schubert, Ernest R. Hamilton, Cornel A. Leahu, Alfred Kovach and Miles A. Hernly met and had conversations in Chicago, Illinois.

(6) On or about September 21, 1969, Ernest R. Hamilton, Charles W. Schubert, Charles C. Fitzgerald, Melvin C. Wetterlin and Miles A. Hernly met and had conversations in Hammond, Indiana.

(7) In or about October, 1969, Ernest R. Hamilton, Charles W. Schubert, Charles C. Fitzgerald, Melvin C.

Wetterlin, Laurance Hinesley and Miles A. Hernly met and had a conversation in Indianapolis, Indiana.

(8) In or about November 1969, Cornel A. Leahu, Alfred Kovach and Miles A. Hernly met and had a conversation in East Chicago, Indiana.

(9) In or about December 1969, Cornel A. Leahu, Charles W. Schubert, Ernest R. Hamilton, Charles C. Fitzgerald and Melvin C. Wetterlin met in Hammond, Indiana, and prepared and caused to be prepared a fraudulent performance bond.

(10) In or about December 1969, Charles W. Schubert, Charles C. Fitzgerald, Cornel A. Leahu, Ernest R. Hamilton and Miles A. Hernly met and had a conversation in East Chicago, Indiana.

(11) From on or about January 2, 1970 to on or about January 7, 1970, Ernest R. Hamilton, Charles W. Schubert, Melvin C. Wetterlin, Charles C. Fitzgerald and Miles A. Hernly met in Zurich, Switzerland.

(12) On or about January 7, 1970, Miles A. Hernly, Charles C. Fitzgerald, Ernest R. Hamilton, Charles W. Schubert and Melvin C. Wetterlin met in Zurich, Switzerland and signed and executed a Mandate Agreement.

(13) On or about January 8, 1970, Miles A. Hernly met and had a conversation with Cornel A. Leahu in East Chicago, Indiana.

(14) In or about January 1970, Miles A. Hernly received by mail from Zurich, Switzerland a service contract between Hernly Brothers, Inc. and ITAG.

(15) In or about January 1970, Miles A. Hernly received by mail a performance bond premium invoice in the amount of one hundred and forty-three thousand, five hundred and seventy-three dollars and fourteen cents ($143,573.14).

(16) From on or about February 28, 1970 to on or about October 26, 1970, Miles A. Hernly paid to Elmer F. Layden, Jr. of Northwest Insurance Agency, Chicago, Illinois one hundred and forty-three thousand, five hundred and seventy-three dollars and fourteen cents ($143,573.14) for the performance bond premium.

(17) In or about February 1970, Ernest R. Hamilton, Charles W. Schubert, Charles C. Fitzgerald, Melvin C. Wetterlin and Miles A. Hernly met in East Chicago, Indiana, and signed a document authorizing Miles A. Hernly to receive one hundred and five thousand dollars ($105,000) in cash from ITAG.

(18) On or about February 13, 1970, Miles A. Hernly flew to Zurich, Switzerland, paid one hundred and fifty thousand dollars ($150,000) to ITAG, and received one hundred and five thousand dollars ($105,000) in United States currency.

(19) On or about February 14, 1970, Miles A. Hernly met Cornel A. Leahu in Chicago, Illinois and gave Cornel A. Leahu one hundred and five thousand dollars ($105,000) in United States currency.

(20) On or about March 25, 1970 in Zurich, Switzerland, Miles A. Hernly paid ninety thousand dollars ($90,000) to ITAG and received seventy-five thousand dollars ($75,000) in United States currency.

(21) On or about March 26, 1970, in East Chicago, Indiana, Miles A. Hernly met with Cornel A. Leahu and gave Cornel A. Leahu seventy-five thousand dollars ($75,000) in United States currency.

(22) On or about April 20, 1970, Ernest R. Hamilton, representing RSH, Inc. recommended Board approval of Change Order No. 2, increasing the sewer project contract price by eight hundred and thirty thousand, six hundred and forty-six dollars and thirty cents ($830,646.30).

(23) On or about June 1, 1970, Robert Hamilton, Charles C. Fitzgerald, Charles W. Schubert, Alfred Kovach and Miles A. Hernly met and had a conversation in East Chicago, Indiana.

(24) On or about June 5, 1970, in Zurich, Switzerland, Miles A. Hernly paid ITAG three hundred and twenty thousand dollars ($320,000) and received one hundred and twenty-five thousand dollars ($125,000) in United States currency.

(25) On or about June 5, 1970, in Zurich, Switzerland, Miles A. Hernly and Charles W. Schubert negotiated a rental contract with ITAG, described herein in paragraph 35.

(26) On or about June 8, 1970, in Gary, Indiana, Miles A. Hernly gave Cornel A. Leahu one hundred and twenty-five thousand dollars ($125,000) in United States currency.

(27) On or about July 20, 1970, Ernest R. Hamilton, Charles W. Schubert, Charles C. Fitzgerald, Melvin C. Wetterlin, and Miles A. Hernly met and signed a document authorizing Ernest R. Hamilton to receive one hundred thousand dollars ($100,000) from ITAG.

(28) After July 20, 1970, and prior to August 17, 1970, Ernest R. Hamilton traveled to Amsterdam, Netherlands, and received one hundred thousand dollars ($100,000) in United States currency.

(29) On or about August 17, 1970, in East Chicago, Indiana, Ernest R. Hamilton gave Miles A. Hernly one hundred thousand dollars ($100,000) in United States currency.

(30) On or about August 17, 1970, in East Chicago, Indiana, Miles A. Hernly gave Cornel A. Leahu one hundred thousand dollars ($100,000) in United States currency.

(31) On or about September 28, 1970, in East Chicago, Indiana, Miles A. Hernly mailed and caused to be mailed to Zurich, Switzerland, a check payable to ITAG in the amount of three hundred and fifty thousand dollars ($350,000).

(32) On or about September 28, 1970, in East Chicago, Indiana, Miles A. Hernly mailed and caused to be mailed to Zurich, Switzerland, a check payable to ITAG in the amount of eighty thousand dollars ($80,000).

(33) In or about September or October, 1970, Charles C. Fitzgerald, Ernest R. Hamilton, Charles W. Schubert, Melvin C. Wetterlin and Miles A. Hernly met and signed a document authorizing Charles W. Schubert to receive two hundred thousand dollars ($200,000) from the ITAG funds.

(34) On or about October 19, 1970, Charles C. Fitzgerald and Melvin C. Wetterlin traveled to Zurich, Switzerland, and each received one hundred thousand dollars ($100,000) in United States currency.

(35) In or about late October 1970, Melvin C. Wetterlin met with Miles A. Hernly in Chicago, Illinois or East Chicago, Indiana and gave Miles A. Hernly one hundred thousand dollars ($100,000) in United States currency.

(36) In or about late October 1970, Miles A. Hernly met with Cornel A. Leahu in East Chicago, Indiana and gave Cornel A. Leahu one hundred thousand dollars ($100,000) in United States currency.

(37) In or about late October, 1970, Charles W. Schubert met with Miles A. Hernly in East Chicago, Indiana and gave Miles A. Hernly one hundred thousand dollars ($100,000) in United States currency.

(38) In or about late October 1970, in East Chicago, Indiana Miles A. Hernly met with Cornel A. Leahu and gave Cornel A. Leahu one hundred thousand dollars ($100,000) in United States currency.

(39) On or about Decembver 11, 1970, Ernest R. Hamilton, Charles W. Schubert, Charles C. Fitzgerald, and Miles A. Hernly met and signed an authorization for Ernest R. Hamilton to receive two hundred and one thousand, five hundred dollars ($201,500) from the ITAG funds.

(40) In or about early January 1971, Ernest R. Hamilton met with Miles A. Hernly in East Chicago, Indiana, and gave Miles A. Hernly one hundred thousand dollars ($100,000) from the ITAG funds.

(41) In or about early January 1971, Miles A. Hernly met with Cornel A. Leahu in East Chicago, Indiana, and gave Cornel A. Leahu one hundred thousand dollars ($100,000) in United States currency.

42. In or about January, 1971, Miles A. Hernly met with an ITAG manager in East Chicago, Indiana and received from him one hundred thousand dollars from the ITAG funds.

(43) In or about January 1971, Miles A. Hernly met with Cornel A. Leahu in East Chicago, Indiana, and gave Cornel A. Leahu one hundred thousand dollars ($100,000) in United States currency.

(44) In or about January 1971, Ernest R. Hamilton, Charles W. Schubert, Charles C. Fitzgerald, Miles A. Hernly and Jordan R. Smith, met and had a conversation in Denver, Colorado.

(45) On or about March 29, 1971, in Hammond, Indiana an ITAG representative gave Miles A. Hernly fifty thousand dollars ($50,000) in United States currency from the ITAG funds.

(46) On or about March 29, 1971, Miles A. Hernly met with Cornel A. Leahu in East Chicago, Indiana and gave Cornel A. Leahu fifty thousand dollars ($50,000) in United States currency.

(47) On or about April 27, 1971, an ITAG representative met with Miles A. Hernly in East Chicago, Indiana and gave Miles A. Hernly one hundred thousand dollars ($100,000) from the ITAG funds.

(48) On or about April 27, 1971, Miles A. Hernly met with Cornel A. Leahu in East Chicago, Indiana, and gave Cornel A. Leahu one hundred thousand dollars ($100,000) in United States currency.

(49) Between on or about April 5, 1971, and on or about December 28, 1971, Miles A. Hernly provided and caused to be provided to BESSI, nine payments totalling 3.2 million dollars.

(50) On or about June 24, 1971, in Highland, Indiana Miles A. Hernly received one hundred thousand dollars ($100,000) of the ITAG funds, from an ITAG representative.

(51) In or about June, 1971 or early July, 1971, Miles A. Hernly met with Cornel A. Leahu in East Chicago, Indiana and gave Cornel A. Leahu forty-five thousand dollars ($45,000) in United States Currency.

(52) On or about July 16, 1971, Robert L. Hamilton, representing RSH, Inc., recommended Board approval of Change Order No. 5, increasing the sewer project contract price by twenty-eight thousand, eight hundred and forty-six dollars and sixty cents ($28,846.60).

(53) In or about October, 1971, Miles A. Hernly met and had a conversation with Charles W. Schubert in Indianapolis, Indiana.

(54) In October, 1971, Miles A. Hernly signed an authorization for Ernest R. Hamilton to receive an accounting of all ITAG funds in Zurich, Switzerland.

(55) In October, 1971, Ernest R. Hamilton traveled to Zurich, Switzerland.

(56) In November, 1971, Laurance Hinesley traveled to Zurich, Switzerland, and received thirty-five thousand dollars ($35,000) from the ITAG funds.

(57) In or about November, 1971, Laurance Hinesley gave twenty-five thousand dollars ($25,000) to Charles W. Schubert.

(58) On or about January 20, 1972, Miles A. Hernly mailed and caused to be mailed to ITAG, Brig, Switzerland, a letter stating the intention of Hernly Brothers, Inc. to pay ITAG twenty thousand dollars ($20,000) for consulting services for the last six months of 1971.

(59) On or about February 18, 1972, Miles A. Hernly mailed and caused to be mailed to ITAG, Brig, Switzerland, a letter agreeing to pay ITAG thirty thousand dollars ($30,000) for the earlier dissolution of the consulting contract upon receipt of final payment on the East Chicago sewer project.

(60) On or about May 31, 1972, Ernest R. Hamilton conveyed his undivided one-half interest in the 40% net operating profits in Columbine I properties to BESSI, and received from BESSI a promissory note in the amount of one million, ninety thousand, nine hundred and thirty dollars ($1,090,903.00).

(61) On or about May 31, 1972, Charles W. Schubert conveyed his undivided one-half interest in the 40% net operating profits of Columbine I properties to BESSI, and received from BESSI a promissory note in the

amount of one million, one hundred and sixty-five thousand, six hundred and sixty-eight dollars ($1,165,668.00), which included payment of one million, ninety thousand, nine hundred and thirty dollars ($1,090,930.00) for his interest in the Columbine I properties.

(62) On or about March 9, 1973, Ernest R. Hamilton, Charles W. Schubert and Miles A. Hernly met and had a conversation in Indianapolis, Indiana.

(63) On or about August 28, 1973, Ernest R. Hamilton signed a change order approving final sewer project changes to be performed by Hernly Brothers, Inc.

(64) The Grand Jury realleges and incorporates by reference the allegations contained in Counts Two through Seven of this indictment, each of which counts is alleged as a separate and distinct overt act.

All in violation of Title 18, United States Code, Section 371.

COUNT II

The SEPTEMBER 1975 GRAND JURY further charges:

1. Paragraphs one through twenty-one of Count I of this indictment are realleged and incorporated by reference.

2. From on or about August 7, 1967, until on or about the date of the return of this indictment, in the Northern District of Indiana, Hammond Division, and elsewhere,

ERNEST R. HAMILTON,
CHARLES W. SCHUBERT,
CORNEL A. LEAHU,
MELVIN C. WETTERLIN, and
CHARLES C. FITZGERALD,

defendants herein, and Miles A. Hernly, named herein but not as a defendant, and others, devised and intended to devise a scheme and artifice:

(a) To defraud the East Chicago, Indiana Board of Sanitary Commissioners and the citizens of the East Chicago, Indiana Sanitary District of their right to have the District's business and its affairs conducted honestly, impartially, free from bribery, corruption, collusion, fraud, undue influence, dishonesty, conflict of interest, and in accordance with the laws of the State of Indiana.

(b) To defraud the East Chicago, Indiana Board of Sanitary Commissioners and the citizens of the East Chicago, Indiana Sanitary District of their right to the conscientious, loyal, faithful, disinterested and unbiased services of Cornel A. Leahu, Ernest R. Hamilton and Charles W. Schubert, in the performance of acts related to their official duties, functions, and employment.

(c) To defraud the East Chicago, Indiana Board of Sanitary Commissioners and the citizens of the East Chicago, Indiana Sanitary District, of certain secret monies obtained by and expended on behalf of Cornel A. Leahu, Ernest R. Hamilton and Charles W. Schubert, as a result of their positions and conduct as public officials and employees; and

(d) To obtain money and property by means of false and fraudulent pretenses and representations.

3. This scheme and artifice is fully described in paragraphs 23 through 47 of Count I of this indictment and incorporated herein by reference as if set out in full; said objects of the Count I conspiracy being parts of the scheme and artifice to defraud in violation of Title 18, United States Code, Section 1341.

4. On or about October 1, 1971, in the Northern District of Indiana, and elsewhere,

ERNEST R. HAMILTON,
CHARLES W. SCHUBERT,
MELVIN C. WETTERLIN,
CHARLES C. FITZGERALD, and
CORNEL A. LEAHU,

defendants herein, all of whom could reasonably foresee the use of the mails in furtherance of the scheme and artifice to defraud described in paragraphs two and three herein, and for the purpose of executing the aforementioned scheme and artifice to defraud, and attempting to do so, knowingly caused to be delivered by mail according to the directions thereon, an invoice of ITAG, Brig, Switzerland directed to Messrs. Hernly Brothers, Inc., P.O. Box 2283, East Chicago, Indiana, U.S.A., for the October 1971 welding equipment rental in the amount of thirty-five thousand dollars ($35,000.00).

In violation of Title 18, United States Code, Section 1341.

COUNT III

The SEPTEMBER 1975 GRAND JURY further charges:

1. Paragraphs one through three of Count II of this indictment are realleged and incorporated by reference.

2. On or about November 1, 1971, in the Northern District of Indiana, and elsewhere,

ERNEST R. HAMILTON,
CHARLES W. SCHUBERT,
MELVIN C. WETTERLIN,
CHARLES C. FITZGERALD, and
CORNEL A. LEAHU,

defendants herein, all of whom could reasonably foresee the use of the mails in furtherance of the scheme and artifice to defraud described in paragraphs two and three of Count II of this indictment and incorporated by reference in paragraph one herein, and for the purpose of executing the aforementioned scheme and artifice to defraud, and attempting to do so, knowingly caused to be delivered by mail according to the directions thereon, two invoices of ITAG, Brig, Switzerland directed to Messrs. Hernly Brothers, Inc., P.O. Box 2283, East Chicago, Indiana U.S.A. for the November 1971 welding

equipment rental in the amount of thirty-five thousand dollars ($35,000); and the October 1971 technical service fee in the amount of seventy-two thousand, six hundred dollars ($72,600).

In violation of Title 18, United States Code, Section 1341.

COUNT IV

The SEPTEMBER 1975 GRAND JURY further charges:

1. Paragraphs one through three of Count II of this indictment are realleged and incorporated by reference.

2. On or about December 1, 1971, in the Northern District of Indiana, and elsewhere,

ERNEST R. HAMILTON,
CHARLES W. SCHUBERT,
MELVIN C. WETTERLIN,
CHARLES C. FITZGERALD, and
CORNEL A. LEAHU,

defendants herein, all of whom could reasonably foresee the use of the mails in furtherance of the scheme and artifice to defraud described in paragraphs two and three of Count II of this indictment and incorporated by reference in paragraph one herein, and for the purpose of executing the aforementioned scheme and artifice to defraud, and attempting to do so, knowingly caused to be delivered by mail according to the directions thereon, two invoices of ITAG, Brig, Switzerland directed to Messrs. Hernly Brothers, Inc., P.O. Box 2283, East Chicago, Indiana, U.S.A. for the December 1971 welding equipment rental in the amount of thirty-five thousand dollars ($35,000.00), and the November 1971 technical service fee in the amount of seventy-one thousand, two hundred dollars ($71,200.00).

In violation of Title 18, United States Code, Section 1341.

COUNT V

The SEPTEMBER 1975 GRAND JURY further charges:

1. Paragraphs one through three of Count II of this indictment are realleged and incorporated by reference.

2. On or about January 3, 1972, in the Northern District of Indiana, and elsewhere,

ERNEST R. HAMILTON,
CHARLES W. SCHUBERT,
MELVIN C. WETTERLIN,
CHARLES C. FITZGERALD, and
CORNEL A. LEAHU,

defendants herein, all of whom could reasonably foresee the use of the mails in furtherance of the scheme and artifice to defraud described in paragraphs two and three of Count II of this indictment and incorporated by reference in paragraph one herein, and for the purpose of executing the aforementioned scheme and artifice to defraud, and attempting to do so, knowingly caused to be delivered by mail according to the directions thereon, an invoice of ITAG, Brig, Switzerland directed to Messrs. Hernly Brothers, Inc., P.O. Box 2283, East Chicago, Indiana, U.S.A. for the December 1971 technical service fee in the amount of eighty-one thousand, eight hundred dollars ($81,800.00).

In violation of Title 18, United States Code, Section 1341.

COUNT VI

The SEPTEMBER 1975 GRAND JURY further charges:

1. Paragraphs one through three of Count II of this indictment are realleged and incorporated by reference.

2. On or about January 4, 1972, in the Northern District of Indiana, and elsewhere,

ERNEST R. HAMILTON,
CHARLES W. SCHUBERT,
MELVIN C. WETTERLIN,
CHARLES C. FITZGERALD, and
CORNEL A. LEAHU,

defendants herein, all of whom could reasonably foresee the use of the mails in furtherance of the scheme and artifice to defraud described in paragraphs two and three of Count II of this indictment and incorporated by reference in paragraph one herein, and for the purpose of executing the aforementioned scheme and artifice to defraud, and attempting to do so, knowingly caused to be delivered by mail according to the directions thereon, a letter from ITAG, Brig, Switzerland directed to Messrs. Hernly Brothers, Inc., P.O. Box 2283, East Chicago, Indiana, U.S.A. proposing to terminate the contract for consulting services at the end of the year 1971.

In violation of Title 18, United States Code, Section 1341.

COUNT VII

The SEPTEMBER 1975 GRAND JURY further charges:

1. Paragraphs one through twenty-one of Count I of this indictment are realleged and incorporated by reference.

2. In October, 1971, more specific date being unknown to the Grand Jury, in the Northern District of Indiana, and elsewhere,

ERNEST R. HAMILTON,
CHARLES A. SCHUBERT,
CORNEL A. LEAHU,
MELVIN C. WETTERLIN, and
CHARLES C. FITZGERALD,

defendants herein, unlawfully, wilfully and knowingly, with intent to promote, manage, carry on and facilitate the promotion, management and carrying on of an unlawful activity, that is bribery, in violation of the laws of the State of Indiana, in which state the bribery was committed, that is Burns Indiana Statutes, Title 35, Article 1, Chapter 90, Sections 4 and 5; and Title 35, Article 1, Chapter 101, Section 9, did cause Ernest R. Hamilton to travel in interstate and foreign commerce between Zurich, Switzerland, and the Northern District of Indiana, and thereafter the defendants did perform and cause to be performed acts to promote, manage, carry on and facilitate the promotion, management, and carrying on of the unlawful activity;

In violation of Title 18, United States Code, Sections 2 and 1952.

COUNT VIII

The SEPTEMBER 1975 GRAND JURY further charges:

1. From in or about August 1967, until in or about the date of the return of this indictment, in the Northern District of Indiana, and elsewhere,

ERNEST R. HAMILTON,
CHARLES W. SCHUBERT,
MELVIN C. WETTERLIN,
CHARLES C. FITZGERALD, and
CORNEL A. LEAHU,

defendants herein, and Miles A. Hernly, named herein as co-conspirator but not as a defendant, unlawfully, knowingly and wilfully did combine, conspire, confederate and agree together, with each other and with other persons, to defraud the United States of America, by impeding, impairing, obstructing and defeating the lawful governmental functions of the Internal Revenue

Service of the Treasury Department of the United States in the ascertainment, computation, assessment and collection of income taxes under the following circumstances, manner and means:

2. It was a part of the conspiracy to defraud that Ernest R. Hamilton, Charles W. Schubert, Melvin C. Wetterlin, Charles C. Fitzgerald and Miles A. Hernly would and did perform and cause to be performed the acts contained in paragraphs 26 through 40 of Count I of this indictment, which acts are incorporated by reference as parts of the conspiracy alleged herein as Count VIII.

3. It was a part of the conspiracy to defraud that Ernest R. Hamilton, Charles W. Schubert, Melvin C. Wetterlin, Charles C. Fitzgerald, and Miles A. Hernly would and did cause the false and fraudulent payments from sewer project funds to ITAG, denoted in paragraphs 35 and 36 of Count I of this indictment, to be deducted as business expenses from the Hernly Brothers, Inc. and Fitzgerald and Stutz, Inc. joint venture books and records, and Form 1065 United States Partnership Income tax returns for calendar years 1970, 1971 and 1972.

4. It was a part of the conspiracy to defraud that payments to ITAG from the sewer project funds, would be and were utilized as a source of tax free money for payment to Cornel A. Leahu as denoted in paragraph 28 of Count I of this indictment.

5. It was a part of the conspirary to defraud that payments to ITAG from the sewer project funds would be utilized as a source of tax free money for the personal benefit of Ernest R. Hamilton, Charles W. Schubert, Melvin C. Wetterlin, Charles C. Fitzgerald and Miles A. Hernly as described in paragraphs 38b through 38d of Count I of this indictment.

6. It was a part of the conspiracy to defraud that Ernest R. Hamilton, Charles W. Schubert, Melvin C. Wetterlin, Charles C. Fitzgerald and Miles A. Hernly would and did cause the payments pursuant to false invoices denoted in paragraphs 30 through 32 of Count I of this indictment to be utilized for the tax-free personal benefit of Ernest R. Hamilton, Charles W. Schubert, and Laurance Hinesley, and would and did cause these payments to be deducted as legitimate business expenses from the Hernly Brothers, Inc. and Fitzgerald and Stutz, Inc. joint venture books and records, and Form 1065 United States Partnership Income Tax Returns for calendar years 1970, 1971 and 1972.

7. It was a part of the conspiracy to defraud that Ernest R. Hamilton, Charles W. Schubert and Charles C. Fitzgerald, each would and did file false Form 1040 Joint Federal Income Tax returns for calendar years 1970, 1971 and 1972; and that Cornel A. Leahu would and did file false Form 1040 Joint Federal Income Tax returns for calendar years 1970 and 1971.

8. The overt acts in furtherance of and to effect the objects of this conspiracy are fully described in paragraph 48 of Count I of this indictment and are incorporated herein by reference as if set out in full; said overt acts of the Count I conspiracy being overt acts of the conspiracy charged herein as Count VIII. In addition the conspirators committed the following overt acts, among others:

(a) On or about March 15, 1971, Miles A. Hernly signed Form 1065, 1970 U.S. Partnership Tax Return on behalf of the Hernly Brothers, Inc. and Fitzgerald and Stutz, Inc. joint venture.

(b) On or about April 10, 1971, Ernest R. Hamilton signed his 1970, Form 1040 Joint Federal Income Tax Return which 1970 Tax Return was subsequently

amended by Amended Form 1040 Tax Return for calendar year 1970, signed by Ernest R. Hamilton on or about March 20, 1972 and April 11, 1974.

(c) On or about April 14, 1971, Charles W. Schubert signed his 1970, Form 1040 Joint Federal Income Tax Return which 1970 Tax Return was subsequently amended by Form 1040X, signed by Charles W. Schubert on or about April 12, 1974.

(d) On or about April 10, 1971, Charles C. Fitzgerald signed his 1970 Form 1040 Joint Federal Income Tax Return.

(e) On or about March 22, 1971, Cornel A. Leahu signed his 1970 Form 1040 Joint Federal Income Tax Return.

(f) On or about April 12, 1972, Miles A. Hernly signed Form 1065, 1971 U.S. Partnership Tax Return on behalf of the Hernly Brothers, Inc. and Fitzgerald and Stutz, Inc., joint venture.

(g) On or about April 17, 1972, Ernest R. Hamilton signed his 1971 Form 1040 Joint Federal Income Tax Return.

(h) On or about April 14, 1972, Charles W. Schubert signed his 1971 Form 1040 Joint Federal Income Tax Return.

(i) On or about April 17, 1972, Charles C. Fitzgerald signed his 1971 Form 1040 Joint Federal Income Tax Return.

(j) On or about April 13, 1972, Cornel A. Leahu signed his 1971 Form 1040 Joint Federal Income Tax Return.

(k) On or about April 16, 1973, Miles A. Hernly signed Form 1065, 1972 U.S. Partnership Tax Return on behalf of the Hernly Brothers, Inc. and Fitzgerald and Stutz, Inc. joint venture.

(l) On or about April 10, 1973, Ernest R. Hamilton signed his 1972 Form 1040 Joint Federal Income Tax Return.

(m) On or about April 16, 1973, Charles W. Schubert signed his 1972 Form 1040 Joint Federal Income Tax Return.

(n) On or about February 25, 1973, Charles C. Fitzgerald signed his 1972 Form 1040 Joint Federal Income Tax Return.

In violation of Title 18, United States Code, Section 371.

COUNT IX

The SEPTEMBER 1975 GRAND JURY further charges:

1. On October 9, 1975, at Hammond, Indiana, in the Northern District of Indiana,

ALFRED KOVACH

defendant herein, while under oath as a witness before the September 1975 Grand Jury of the United States of America, duly impaneled and sworn in the United States District Court for the Northern District of Indiana, in a case then and there pending before the Grand Jury did knowingly make material false declarations.

2. At the time and place aforesaid, the Grand Jury was conducting investigations into possible violations of the criminal laws of the United States including among others, Sections 1341, 1952 and 371 of Title 18, United States Code.

3. During the course of the Grand Jury investigation, it became and was a matter material for the Grand Jury to determine whether the defendant Alfred Kovach had travelled in interstate commerce to attend a meeting in which payment of monies to public officials was discussed; whether he had knowledge of or had participated in

a scheme to divert money from the East Chicago Pollution Abatement Project for public officials; whether he was present during a conversation in which payments of money for East Chicago politicians was discussed; and whether he had discussed the diversion of money from the East Chicago Pollution Abatement Program with Charles W. Schubert, Ernest R. Hamilton, Miles A. Hernly, Charles C. Fitzgerald or Cornel A. Leahu.

4. At the time and place aforesaid, defendant Alfred Kovach, while under oath, knowingly did declare before the Grand Jury with respect to the aforementioned material matter that he had never travelled in interstate commerce to attend a meeting in which payment of monies to public officials was discussed; that he had no knowledge of and had not participated in a scheme to divert money for public officials from the East Chicago Pollution Abatement Project; that he was not present during a conversation in which payments of money for East Chicago politicians was discussed; and that he had not discussed the diversion of money from the East Chicago Pollution Abatement Program with Charles W. Schubert, Ernest R. Hamilton, Miles A. Hernly, Charles C. Fitzgerald and Cornel A. Leahu.

The aforesaid declarations by the defendant were false and were known by him to be false when made, because in or about September or October 1969, the defendant Alfred Kovach travelled to Chicago, Illinois to attend a meeting with Ernest R. Hamilton, Charles W. Schubert, Melvin C. Wetterlin, Charles C. Fitzgerald, Cornel A. Leahu and Miles A. Hernly at which time the division of monies from the East Chicago Pollution Abatement Program for East Chicago public officials was discussed; and because the defendant Alfred Kovach knew of a scheme to divert money for public officials from the East Chicago Pollution Abatement Project.

In violation of Title 18, United States Code, Section 1623.

COUNT X

The SEPTEMBER 1975 GRAND JURY further charges:

1. On October 9, 1975, at Hammond, Indiana, in the Northern District of Indiana,

MELVIN C. WETTERLIN,

defendant herein, while under oath as a witness before the September 1975 Grand Jury of the United States of America, duly impaneled and sworn in the United States District Court for the Northern District of Indiana in a case then and there pending before the Grand Jury did knowingly make material false declarations.

2. At the time and place aforesaid, the Grand Jury was conducting investigations into possible violations of the criminal laws of the United States including among others, Sections 1341, 1952 and 371 of Title 18, United States Code.

3. During the course of the Grand Jury investigation, it became and was a matter material for the Grand Jury to determine whether the defendant Melvin C. Wetterlin had discussed with contractors, public officials or others the payment of money as a bribe or kickback; whether he had traveled in interstate or foreign commerce to transport proceeds illegally obtained from the Water Pollution Abatement Project; whether he had knowledge of or had participated in a plan to divert money from the East Chicago Pollution Abatement Project for pagment to public officials and others; and whether he had participated in a scheme by which shell corporations were utilized as a method of channelling money out of the East Chicago Water Pollution Abatement Project

and out of Hernly Brothers, Inc. and Fitzgerald and Stutz, Inc. Construction Companies; whether he was ever a stockholder in a corporation that was used to channel funds from the Pollution Abatement Project to political officials and others; and whether there was any purpose for his meeting with representatives of ITAG in Zurich, Switzerland other than seeking to represent a German equipment supplier in the United States.

4. At the time and place aforesaid, defendant Melvin C. Wetterlin while under oath, knowingly did declare before the Grand Jury that he had never discussed with contractors, public officials or others the payment of money as a bribe or kickback; that he had not traveled in interstate or foreign commerce to transport proceeds illegally obtained from the Water Pollution Abatement Project; that he had no knowledge of and had not participated in a plan to divert money from the East Chicago Pollution Abatement Project for payment to public officials and others; that he had not participated in a scheme by which a shell corporation was utilized as a method of channelling money out of the East Chicago Water Pollution Abatement Project and out of Hernly Brothers, Inc. and Fitzgerald and Stutz, Inc. Construction Companies; that he was never a stockholder in a corporation that was used to channel funds from the Pollution Abatement Project to political officials and others; and that the only reason for his meeting with representatives of ITAG in Zurich, Switzerland was to seek to represent a German equipment supplier in the United States.

The aforesaid declarations by the defendant were false and known by him to be false when made because from in or about September 1969 up to and including October 9, 1975, the defendant Melvin C. Wetterlin had discussed the payment of money as a bribe or kickback with contractors, public officials, and others; he had traveled in

interstate and foreign commerce to transport proceeds illegally obtained from the Water Pollution Abatement Project; he had knowledge of and had participated in a plan to divert money from the East Chicago Pollution Abatement Project for payment to public officials and others, which scheme utilized a shell corporation of which he was a stockholder; and he had met with representatives of ITAG in Zurich, Switzerland for reasons other than seeking to represent a German equipment supplier in the United States.

In violation of Title 18, United States Code, Section 1623.

A TRUE BILL

FOREMAN

JOHN R. WILKS
United States Attorney

APPENDIX 5

881 The Witness: A. Larry Hinesley was, had a business of his own which represented manufacturers, he was a salesman, a manufacturer's representative, he was a sales manufacturer's representative.

Q. For what type of equipment, sir, if you know?

A. Sewage disposal plant equipment.

Q. Who was Mr. Townsend, Mr. Hernly?

A. Lloyd Townsend was my associate.

Q. Did you have a conversation at this meeting, which you recall?

A. Yes.

Q. What was said?

A. We entered the meeting and we were introduced to Mr. Kovach by Mr. Leahu. Then Fitzgerald went out and brought in Mr. McKinney, and Mr. Bartlett, and introduced them. They were excused from the room.

Q. Then what occurred, Mr. Hernly?

A. Ten Leahu—

Mr. Pontikes: Objection, unless we know who they excused from the room.

Mr. Wehner: The witness testified that Bartlett and McKinney were excused.

Mr. Pontikes: Thank you, very good.

882 Mr. Wehner: Q. Continue, please.

The Witness: A. Mr. Leahu said that the meeting was called to see how $1 million that was needed for the East Chicago officials would be handled, that he believed that the price of the pipe could be inflated, handled through the pipe company.

Charlie Fitzgerald spoke up and said he did not see how pipe that cost $700,000, no matter what company you buy it from, how it could be inflated to $1,700,00 and questions not be asked.

Mr. Leahu and Mr. Kovach had a little private conversation between themselves, and Kovach said this plan would not work, we had to come up with some other type of a plan. Then Hamilton gave his trip to Switzerland and briefed—

Q. No, just what he said, please, Mr. Hernly.

A. Mr. Hamilton said he believed that we had a foolproof method by which money could go to Switzerland and be returned in cash without—and be used, this money would be expense to the company sending it, and it would be non-taxable to the people receiving it. Al Kovach and Leahu had another con-
883 versation, and Al Kovach said he believed this would be the method to be used.

Q. Now, immediately following that meeting, Mr. Hernly, did you have occasion to speak with Charles Schubert?

A. Yes.

Q. Where did you speak with Charles Schubert?

A. During that meeting, or after the meeting was over, Schubert and I went across the street to the West of the Palmer House, to get a bite to eat. As we were walking, just before we stepped off the curb on the East side, Schubert said, "We have got to get Hinesley some payment, some type of money for losing the sale of the big lift station, he will receive no commission on the large lift station." I asked Schubert how much he was thinking about, and he said $50,000, as I stepped off the curb. This jolted my mouth shut, and nothing more was said.

Mr. Wehner: May I approach the witness, Your Honor?

The Court: You may.

Mr. Wehner: Q. Mr. Hernly, I will show you what has been marked for identification as Government Exhibit 21-E, and ask if you can identify that, sir?

APPENDIX 6

909 would just lose that much", and I know that is what it is for. But then Leahu said, "Let's go see Kovach."

Q. Did you then meet with Mr. Kovach, Mr. Hernly?

A. Yes.

Q. When did you meet with Mr. Kovach?

A. That same day.

Q. Who was present?

A. Ted Leahu and Al Kovach and myself.

Q. What was said at that time?

A. Leahu related to Kovach the problem I had with the bond. Then Leahu had a quiet conversation with Kovach. Leahu asked if I cared if he helped to see if he could get a bond, or if he could help get a bond, and I said no, I would be glad for him to.

So Leahu and Kovach talked again, then Kovach slapped Leahu on the shoulder and said, "See what you can do, see what you can work out."

Q. Subsequent to the meeting with Leahu and Kovach, did you have occasion to meet with Elmer F. Leydon?

A. Yes.

Q. Where did that meeting occur?

A. I believe that was in the office of Charles Fitzgerald, which was located at the disposal plant for the Division U.

APPENDIX 7

1241 equipment which was not readily available in the United States.

Q. Was any agreement made at that time regarding the persons to go to Switzerland to negotiate that contract?

A. Yes. I said that I thought that Fitzgerald or Wetterlin or myself should go to Switzerland, who understood the type of equipment that we might need. Hamilton said he wanted Schubert or himself to go with one of us. It was determined that Schubert and myself would go.

Q. Mr. Hernly, directing your attention to early June of 1970, did you go to Zurich, Switzerland on that date?

A. Yes.

Q. Directing your attention to a few days prior to your trip to Zurich, Switzerland, did you attend a meeting with Alfred Kovach?

A. Yes.

Q. Where did this meeting take place?

A. In the basement office of Alfred Kovach, in the store.

Q. Where is that store located, Mr. Hernly?

A. In East Chicago.

1242 Q. Who was present at that time?

A. Robert Hamilton, Schubert, Fitzgerald, and myself, and Mr. Kovach.

Q. What was said at that meeting?

A. Hamilton explained to Mr. Kovach that we had a—I'm sorry, Mr. Schubert explained to Mr. Kovach that we had an estimate prepared, that Robert Hamilton had told him that Leahu did not submit—

Mr. Van Bokkelen: I will object to any conversation about Mr. Leahu when Mr. Leahu was not pres-

ent, as being hearsay statements and the proper foundation for that statement has not been established at this time.

The Court: The objection will be overruled.

Mr. Wehner: Q. Please continue with the conversation, Mr. Hernly.

A. Leahu would not permit this paperwork to go forward for payment until he received more money. I explained to Kovach the procedure of receiving money to be returned to the United States—

Q. Excuse me, just explain what you said to Mr. Kovach.

1243 A. I said to Mr. Kovach that we cannot return any more money to the United States until more money goes to ITAG. On the first trip, there had been $70,000.00 returned out of $150,000.00, which was 70 percent.

The second trip, there were $75,000.00 returned out of the $90,000.00, which is more than 70 percent, and the ITAG officials objected to letting that amount come back. So, there was no way we could get more money from ITAG officials until more money went over, according to the Letter of Intent and the mandate.

Q. Excuse me, Mr. Hernly, how much money came back the first time?

A. $105,000.00.

Q. After you explained this to Mr. Kovach, what other conversation did you have?

A. Mr. Kovach—I said to Mr. Kovach that the other money has been used on mobilization, buying equipment, and put into the job. Mr. Kovach said—Mr. Robert Hamilton said that Leahu was at the airport, leaving for a trip to England. Schubert asked Kovach to get him back before he left, to get the papers through.

APPENDIX 8

2873 Q. All right. Would that constitute a log, in your opinion, of the type that you just described to the ladies and gentlemen of the jury?

A. It could, yes.

Q. Do you recall whether or not that log ended as of April, 1971, or don't you have an independent recollection?

A. I don't know. I kept them filed up to the date they came to me at Parker, Indiana, for some period, to the time they either quit coming or else I quit filing them. I don't recall.

Q. You don't recall independently what the last entries on the log were?

A. I do not.

Q. Now, Mr. Hernly, was Mr. Kovach present at any of the meetings in Riley Towers or at the meetings with Wetterlin's attorney?

A. He was not.

Q. Was he present when you and Wetterlin and Leahu met in East Chicago, when you put up the performance bond for Division U?

A. He was not.

Q. Was he present in the meeting you had in the Holiday Inn?

2874 A. He was not.

Q. Was he present at the Ramada Inn meeting that you had thereafter?

A. He was not.

Q. Was he present at any of the meetings that you had with regard to the Wleklinski and Callahan matter in November of 1969?

A. He was not.

Q. Was he present in your meetings in New York with Dr. Zweifel?

A. He was not.

Q. Was he present at any meetings in Zurich in the year of 1970?

A. He was not at any meeting in Zurich that I know of.

Q. All right. To your knowledge, does his name appear on any of the documents connected with the East Chicago Water Pollution Abatement project and also the Sanitary District of East Chicago?

A. Not to my knowledge.

Q. Does his name appear on any of the documents in ITAG?

A. Not to my knowledge.

Q. Did he have any connection with ITAG?

A. Not to my knowledge.

Q. Does his name appear on any of the documents
2875 in Columbine I?

A. No.

Q. Did he have anything to do with BESSI?

A. No.

Q. Does his name appear on any document connected with BESSI?

A. Not to my knowledge, any document I have seen, no.

Q. Did he have any connection whatsoever with the joint venture between Hernly Bros., Inc. and Fitzgerald and Stutz?

A. No.

Q. Did he have any connection with the bankruptcy proceedings that BESSI underwent?

A. No.

Q. Was he present in February, 1970 when there was an authorization signed to be sent to ITAG to receive money?

A. No.

Q. Was he present in February, 1970, when, as you testified, you gave Leahu $105,000?

A. No.

Q. Was he present in Zurich, Switzerland in March of 1970 when you were in Zurich receiving money from ITAG?

A. No.

Q. Was he present in March, 1970, when you gave
2876 money to Leahu?

A. No.

Q. Was he present in June, 1970 in Zurich, Switzerland, when you received $320,000 from ITAG?

A. I don't believe there's any time we received $320,000.

Q. I'm sorry, when you paid $320,000 and received $105,000, I stand corrected.

A. Your question?

Q. Was he present?

A. No, he was not.

Q. Was he present in Zurich when you negotiated the rental contract with Schubert and Peduzzi?

A. No.

Q. Was he present in July of 1970 when authorization was signed, authorizing Hamilton to receive $100,000 from ITAG?

A. No.

Q. Was he present in Switzerland when Hamilton allegedly received that money?

A. No, not to my knowledge.

Q. To your knowledge, did he at any time have any connection with any of the transactions in Switzerland, Mr. Hernly?

A. Not to my knowledge.